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72-225

Supreme Court, U. S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

—— 72-225

PATROCINIA L. VDA DE RODULFA,

and

JULIANA CAPARAS VDA DEL ROSARIO, *Petitioners,*

v.

UNITED STATES OF AMERICA,

and

DONALD E. JOHNSON, ADMINISTRATOR OF VETERANS AFFAIRS, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
A. The Judicial Proceedings in the de Rodulfa Case	4
B. The Judicial Proceedings in the del Rosario Case	6
C. The Proceedings Below	6
D. These are "Test" Cases	7
REASONS FOR GRANTING THE WRIT	8
I. Amended Section 211(a) Did Not Take Away the Court's Jurisdiction To Review the Validity and Reasonableness of the Fees Awarded by the District Court	8
II. Counsel Have Vested Interests in Their Liens and Judgments for Fees	11
III. Counsels' Vested Interests in Their Judgments and Liens Are Protected Against Impairment by the Due Process Clause of the Fifth Amendment to the United States Constitution	14
IV. Respondents Did Not Have Standing To Appeal	17
V. The General Savings Statute Protects Counsels' Rights	18
CONCLUSION	19

Page

APPENDIX

Constitution of the United States:
Fifth Amendment 2a

Statutes Involved:
Title 1 U.S.C. § 109 ..... 1a
Title 38 U.S.C. § 211(a) (1958) 1a
Title 38 U.S.C. § 211(a) (1970) 1a

Opinion of the United States Court of Appeals 3a

Opinion of Judge Holtzoff Regarding Claim of de Rodulfa 35a

Opinion of Judge Holtzoff Regarding Attorneys' Fees 39a

Order and Judgment of Judge Corcoran Regarding del Rosario 42a

Respondents' Corrected Tables A, B and C Showing Details of Judgments in 134 Cases Being Held in Abeyance by Lower Courts 44a

Respondents' Supplement To Corrected Tables A, B and C 58a

Letter from Veterans' Administrator to Chairman of House Committee 60a

TABLE OF CITATIONS

CASES:

Boilermakers International v. *NLRB*, 316 F.2d 373 (D.C. Cir. 1963) 10
Clay County v. *Manning*, 272 Ky. 66, 118 S.W.2d 129 (1938) 18
De La Rama Steamship Co. v. *United States*, 344 U.S. 386 (1953) 19
De Rodulfa v. *United States*, 295 F.Supp. 28 (D.C.D.C. 1969) 1
De Winter v. *Thomas*, 34 App. D.C. 80 (D.C. Cir. 1909), cert. den. 215 U.S. 609 13
Doerschuck v. *Mellon*, 55 F.2d 741 (D.C. Cir. 1931) 12
Freeman v. *Ryan*, 408 F.2d 1204 (D.C. Cir. 1968) 13
Greene v. *United States*, 376 U.S. 149 (1964) 10

Page

High Point Casket Co. v. *Wheeler*, 182 N.C. 450, 109 S.E. 378 (1921) 18
Houston v. *Ormes*, 252 U.S. 469 (1920) 12
Ingersoll v. *Coram*, 211 U.S. 335 (1908) 13
In Re Michigan-Ohio Building Corp., 117 F.2d 191 (7th Cir. 1941) 17, 18
Littel v. *Morton*, 445 F.2d 1214 (6th Cir. 1971) 14
Lynch v. *United States*, 292 U.S. 571 (1933) 16
McCormack v. *Harrah*, 51 F.2d 316 (D.C. Cir. 1931) .. 12
McCullough v. *Virginia*, 172 U.S. 102 (1898) 15
Mellon v. *Orinoco Iron Company*, 266 U.S. 121 (1924) 12
Pacific M.S.S. Co. v. *Joliffe*, 69 U.S. 450 (1865) 17
Schmidt v. *McCarthy*, 369 F.2d 176 (D.C. Cir. 1966) .. 13
Thompson v. *Gleason*, 317 F.2d 900 (D.C. Cir. 1962) 4, 8, 10
Tracy v. *Gleason*, 379 F.2d 469 (D.C. Cir. 1967) 4, 8, 10
United States v. *Adamant Co.*, 197 F.2d 1 (9th Cir. 1952), cert. den. 344 U.S. 903 .....13, 17, 18
United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) 17
Wellman v. *Whittier*, 259 F.2d 163 (D.C. Cir. 1958)..4, 8, 10

STATUTES:

United States Code:

Title 1, Section 109 18
Title 28, Section 1254(1) 2
Title 28, Section 2678 5
Title 38, Section 211(a) (1958) 2
Title 38, Section 211(a) (1970) 3, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18
Title 38, Sections 321-322 4
Title 38, Sections 701 *et seq.* 4
Title 38, Section 784(g) 5
Title 42, Section 406(b)(1) 5

UNITED STATES CONSTITUTION:

Amendment 5 .....3, 14

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

An unreported opinion of District Judge Holtzoff, which holds that the government erroneously forfeited the wartime death compensation benefits of petitioner de Rodulfa is printed at pages 35a-38a of the Appendix hereto. An opinion of Judge Holtzoff in the *de Rodulfa* case, which pertains to the award of counsel fees, is reported at 295 F.Supp. 28 (1969) and is

printed at pages 39a-41a of the Appendix. There are no opinions of District Judge Corcoran in the *del Rosario* case but his judgment is printed at pages 42a-44a of the Appendix. The opinion of the Court of Appeals, which pertains to both de Rodulfa and del Rosario, is printed at pages 3a-34a of the Appendix.

JURISDICTION

The judgment and opinion of the Court of Appeals was entered on March 24, 1972. A timely petition for rehearing by the deciding panel or suggestion for rehearing *en banc* was denied on May 12, 1972.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

This petition calls into question the effect of the amendment of Section 211(a) of Title 38 of the United States Code upon the jurisdiction of the Court of Appeals. The questions presented are:

1. Whether the Court of Appeals erred when it held that Section 211(a), as amended more than eight months after oral argument of these cases in the Court of Appeals, required that Court to *dismiss for lack of jurisdiction* the appeals of the United States and the Administrator of Veterans' Affairs and, despite such dismissal, to set aside and vacate those portions of two District Judges' orders which awarded attorneys' fees to petitioners' appointed counsel who, after years of litigation, had obtained *final* judgments for petitioners which total more than $140,000.

2. Assuming, *arguendo,* that amended Section 211(a) was intended to take away the Court's jurisdiction of these cases, then the following questions arise:

(a) Whether counsels' liens and the *judgments* for counsel fees (which were entered eighteen months before the amendment) are protected against impairment by the due process clause of the Fifth Amendment to the United States Constitution.

(b) Whether the United States and the Administrator had standing to appeal the awards of attorneys' fees where no appeal was taken from the judgments in favor of petitioners and where the government's total liability was not affected by the awards of attorneys' fees.

(c) Whether the General Savings Statute preserves counsels' judgments for attorneys' fees.

STATUTES INVOLVED

This case involves the the Fifth Amendment to the United States Constitution and the Act of August 12, 1970, Public Law No. 91-376, § 8(a), 84 Stat. 790, 38 U.S.C. § 211a, the pertinent provisions of which are set forth in the Appendix to this petition at pages 1a-2a.

STATEMENT OF THE CASE

The basic facts in this case are set forth at length in the opinion of the Court of Appeals (A., pp. 3a-7a). The facts necessary to decision of the issues raised herein can be capsulated into the following. Mrs. de Rodulfa and Mrs. del Rosario are widows of two Filipino scouts who died in the line of duty in 1942. In 1945, both widows applied for and received, both for themselves and their children, benefits under the National Service Life Insurance and the Wartime Death Compensation programs.[1] In 1955, the Veterans'

[1] Title 38 U.S.C. §§ 701 *et seq.* and §§ 321, 322, respectively.

Administration terminated Mrs. de Rodulfa's awards administratively. Mrs. del Rosario's Wartime Death Compensation award was forfeited by the Veterans' Administrtion in 1954 and the Administrator also established a continuing offset of accruing monthly insurance benefits against the past overpayment of compensation to Mrs. del Rosario. Neither of the Administrator's decisions had anything to do with whether or not attorney's fees would be awarded and counsel did not participate in those administrative proceedings.

A. The Judicial Proceedings in the de Rodulfa Case.[2]

In 1965, Mrs. de Rodulfa instituted the present suit in the District Court on a *pro se* complaint in which she prayed that her benefits be restored and that the Court "appoint the Law Office of Wallace, Lerch, & Pillote as her attorney of record . . ." and ". . . to deduct ten percentum (10%) from the claim as plaintiff's attorney's fees if the claim is successful." The trial court appointed Robert L. Pillote to represent the plaintiff and both Pillote and Henry F. Lerch of the said firm entered their appearances. They filed an amended complaint which brought in the Administrator of Veterans' Affairs, prayed for the restoration of the National Service Life Insurance benefits and asked ". . . that of the proceeds for which said judgment is given that 10% be deducted and paid to plaintiff's attorney as reasonable attorney's fees

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[2] The District Court clearly had jurisdiction over the instant cases. *Wellman* v. *Whittier*, 104 U.S. App. D.C. 6, 11-12, 259 F.2d 163, 168-169 (1958); *Thompson* v. *Gleason*, 115 U.S. App. D.C. 200, 207, 317 F.2d 900, 907 (1962); and *Tracy* v. *Gleeson*, 126 U.S. App. D.C. 415, 418-420, 379 F.2d 469, 472-474 (1967).

herein"[3], and sought resoration of the death compensation award and prayed that the court determine and award reasonable attorney's fees, same to be paid from the award.[4]

After a non-jury trial, the District Court found the claim for life insurance benefits was barred by the statute of limitations, but declared that the Administrator's forfeiture of the death compensation award was null and void and ordered reinstatement of those benefits, both past and future (A. 38a). The final judgment in favor of Mrs. de Rodulfa is valued by respondents at more than $75,000.00 (A. 48a). Petitioner's attorney then moved for allowance of attorney's fees and the government opposed the motion. Judge Holtzoff rendered an opinion (A. 39a) rejecting the argument that counsel fees were statutorily prohibited[5] and entered an order amending the judgment to provide for a fee equal to 25% of all sums due and payable to petitioner, same to be withheld by the Administrator and paid to counsel (see footnote 4, *supra*).

The United States and the Administrator appealed *only* from that portion of the judgment which awarded attorney's fees. In other words, the government did not attack that part of the judgment which restored death benefits to Mrs. de Rodulfa, that award is *final*

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[3] Title 38 U.S.C. § 784(g), establishes a ceiling of 10% on National Service Life Insurance litigated cases.

[4] There is no statutory limitation on attorneys' fees in litigation involving death compensation. Awards of 25% of the sums recovered are permitted in litigated cases by the Social Security Act, 42 U.S.C. 406(b)(1) and the Federal Tort Claims Act, 28 U.S.C. 2678.

[5] At least ten District Court judges reversed the decisions of the Veterans' Administration in similar cases and, over government objection, awarded attorney's fees to the court-appointed counsel. They were Judges Mathews, McGuire, Corcoran, Gesell, Holtzoff, Waddy, Gasch, Curran, Hart and Robinson.

and she has been paid 75% of her accrued benefits (A. 44a, 48a).

B. The Judicial Proceedings in the del Rosario Case.

In 1967, Mrs. del Rosario filed a *pro se* complaint to compel resumption of her discontinued payments. She prayed that Harold J. Nussbaum be appointed by the court to represent her and "that he be awarded reasonable counsel fees for his services."[6] The court made the requested appointment and, following cross-motions for summary judgment, the court ordered the National Service Life Insurance claim dismissed. However, it ordered the Administrator to reinstate and pay past due and future accruing death compensation benefits to Mrs. del Rosario and her three living children, with a credit for unrecovered overpayments on the account of a deceased child and adjustments incidental thereto. The judgment, allowed and required the Administrator to withhold 20% "of all sums due and payable . . . pursuant hereto" as the fees of her counsel (A. 44a). The respondents appealed *only* from that portion of the judgment which awarded attorney's fees. The *final* judgment of Mrs. del Rosario is valued at more than $65,000.00 and she has been paid her accrued benefits less deduction of the 20% attorney's fee (A. 44a, 50a).

C. The Proceedings Below.

The appeals in the two cases were consolidated, the issues on appeal being whether the trial court (1) had authority to award attorneys' fees and, if it had such authority (2) were the fees reasonable. The cases were briefed and, on December 3, 1969, the Court heard oral argument. On August 12, 1970, Section 211(a) was amended. On March 24, 1972, the Court of Appeals

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[6] The statutorily allowable 10% was requested for services in connection with the National Service Life Insurance claim.

held that the amendment deprived it of jurisdiction to review the judges' awards of attorneys' fees. Accordingly, it refused to pass on the merits of the appeals, erroneously noted that appointed counsel were "volunteers", and ordered the fee awards vacated and the appeals dismissed for lack of jurisdiction. The government's appeals—as the opinion below "noted with the greatest care"—were limited to ". . . only so much of the judgments as awarded counsel fees, leaving all other provisions—those ordering payments to the claimants—as they were" (A. 10a).

D. These are "Test" Cases.

Counsel here and many other attorneys over the past ten years have been appointed by the trial court to represent indigent Filipino widows in hundreds of *pro se* civil actions. While frequently unsuccessful, these court-appointed attorneys have obtained judgments in a total of 134 death benefit cases, representing total estimated recoveries for plaintiffs of $3,569,599.19 (A. 58a). The final disposition of these cases are being held in abeyance in either the Court of Appeals or the District Court pending final determination of this petition.

The decision below will also have a decisive impact on the rights of at least fifty-five other Filipino widows who have obtained but have not been paid judgments which aggregate more than $1,000,000 (A. 54a-57a). Those cases are being held in abeyance by the court below pending the outcome of the cases here in issue.

Counsel have been advised the respondents probably will not pay the widows the sums withheld for attorneys' fees even if the attorneys are not paid. If this result is permitted the government will be unjustly enriched.

REASONS FOR GRANTING THE WRIT

I.

Amended Section 211(a) Did Not Take Away the Court's Jurisdiction To Review The Validity And Reasonableness Of The Fees Awarded By The District Court.

It is clear, both from the face of amended Section 211(a), its legislative history, and from certain of the conclusions of the Court of Appeals, that Section 211(a) does not and was not intended to deprive the Court of Appeals of jurisdiction to review the award of attorneys' fees in these cases where the judgments were entered and counsels' rights arose prior to the amendment of Section 211(a).

On its face, Section 211(a) is triggered only when (1) judicial review is being sought of a decision of the *Administrator* and (2) such decision pertains to questions of law or fact *under any law administered by the Veterans' Administration providing benefits for veterans.* Neither of these threshold criteria is present in the instant cases. To the contrary, the appealed decisions:

(a) Were made by District Court judges—not the Administrator.

(b) Were based on counsels' charging liens (which resulted from plaintiffs' specific prayers) and the District Court's inherent and equitable power to prevent unjust enrichment—not under any law administered by the Veterans' Administration providing benefits for veterans.

(c) Were made in cases where the District Court had jurisdiction under the *Wellman, Thompson* and *Tracy* decisions and *final* judgments in favor of the petitioners and against the government were entered.

The final proof of the truth of this position is the fact that neither counsel performed any service before the Administrator and the Administrator has not had the occasion to make any decision pertaining to their fees.

Despite the clear and unequivocal language of Section 211(a), the opinion below found that the *judges' decisions* were "decisions of the Administrator." This reasoning is not only fallacious but it was based on a hypothesis which could never occur; i.e., that since the attorneys' fees would have fallen *if* the awards to the widows had been appealed and were subject to amended Section 211(a), then they must fall even though the widows' judgments became final some eighteen months before Section 211(a) was enacted (A. 11a-12a, 34a). The fact is that the widows' awards were not appealed and the attorneys' awards were an inherent, inseparable part of that judgment. It was the judgment for the widows which had to be cut before the branch dealing with counsel fees could be severed.[7]

The opinion correctly recognized that "The fees were simply incidents of the litigation in the District Court" (A. 12a) but erroneously concluded "that this court lacks jurisdiction to do aught but leave the *Administrator's ruling* standing as to so much of the judgments as have not achieved finality" (A. 12a, emphasis added). Since the Administrator had not made any such ruling, this statement in the opinion is incomprehensible. Whatever the opinion attempted to say, it never bridged the gap between "judge's decision" and "Administrator's decision."

The explicit language of Section 211(a) also shows that it was not intended to be applied to such facts as

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[7] See the court's comment concerning the root and the branch (A. 12a).

exist here. That section is nothing more nor less than a statute banning judicial review of administrative decisions in certain circumstances. Those circumstances do not include the *judicial award* of attorneys' fees by a court which possesses full jurisdiction and authority. In the circumstances covered by Section 211(a), there can be no judicial review and, therefore, no award of attorneys' fees. In short, Section 211(a) pertains only to claims which never get to court. Therefore, it has nothing whatsoever to do with whether or not counsel fees can be awarded in *litigated* matters.

The legislative history also confirms a lack of Congressional intent that Section 211(a) would have any affect on the instant cases. Congress was aware of the many judgments in favor of widows which had become final because the Solicitor General did not seek review by this Court of the *Wellman, Thompson,* and *Tracy* decisions, and the many cases involving orders subject to appeal that attorneys' fees be deducted and paid. Despite this knowledge, Congress did not include one word in Section 211(a) to cover the instant case. Its silence must mean Congress did not intend Section 211(a) to affect the instant cases. If it had, specific language to that effect would have been included. However, not one word in Section 211(a) or its legislative history requires, or even suggests, the result reached in the opinion below. It is an elementary principle that legislation purporting to deprive the judicial branch of jurisdiction must be strictly construed and the intent so to do must clearly appear from the unequivocal language of the Act. *Boilermakers Int'l* v. *NLRB,* 114 U.S. App. D.C. 372, 374, 316 F.2d 373, 375 (1963) and *Greene* v. *United States,* 376 U.S. 149, 160, 11 L.ed 2d 576 (1964).

Finally, the opinion is not consistent with its conclusion that Section 211(a) was intended to bar review

here. Thus, the opinion carefully noted that the ". . . fees were simply incidents of the litigation in the District Court . . ."; that they were not a liability "incurred under" Section 211(a) in its pre-amendment formulation; that Section 211(a) "had nothing whatever to do with counsel fees"; that there is no veterans' law pertaining to wartime death compensation claims which goes to the matter of attorneys' fees for in-court service; and that liability for attorneys' fees "must seek its source outside the scheme of those laws" (A. 12a, 25a). If these findings are correct, how could the amendment immunizing the Administrator's decisions from judicial review have anything to do with the fees awarded by the trial judges in cases where they had full jurisdiction?

II.

Counsel Have Vested Interests in Their Liens and Judgments for Fees.

The opinion erroneously assumed that even though counsel have a meritorious claim it is not enforceable in this suit. Thus, the opinion, after twice stating that counsel have no right to compensation from public monies (A. 30a-31a) goes on to say:

> "Section 211(a) left unimpaired any litigable claim of counsel against their clients, *and in any event the federal treasury is not available as a source of satisfaction of the claim.*" (A. 32a, footnote omitted, emphasis added).

The italicized portion does not accurately reflect the law. In the first place, the monies from which counsel were to be paid were not public monies; the fees were to be paid from the funds ordered to be paid to peti-

tioners. In the second place, it makes no difference that the funds are deposited in the U. S. Treasury. Counsels' charging liens, as well as other liens, will reach funds in the Treasury. *Houston* v. *Ormes,* 252 U.S. 469, 64 L.ed 667 (1920); *Mellon* v. *Orinoco Iron Company,* 266 U.S. 121, 69 L.ed 199 (1924); *McCormack* v. *Harrah,* 60 App. D.C. 260, 51 F.2d 316 (1931); and *Doerschuck* v. *Mellon,* 60 App. D.C. 383, 55 F.2d 741 (1931).

Houston v. *Ormes* involved a fund appropriated by Congress to pay a person in satisfaction of a finding of the Court of Claims. An action was brought by that person's attorney for attorney's fees to be paid by the Secretary of the Treasury from the fund. The government's contention was that the object of the suit and the effect of the decree were to control the action of the Secretary of the Treasury in performance of official duties and therefore a suit against the United States. The Court held that it was:

> ". . . settled that in such a case a suit brought by the person entitled to performance of the duty against the official charged with its performance is not a suit against the government." (252 U.S. at page 472)

In the *Mellon* case, the Court below, with reference to a banker's claim against German funds held by the Secretary of the Treasury as a trustee, said:

> ". . . it was held that the payment by the government of a trust fund to the person entitled to receive it is a ministerial duty, the performance of which may be compelled by mandamus, and that, as a necessary consequence, where another has an equitable right in the fund he may have relief against the officials of the Treasury through a mandatory writ of injunction or a receivorshop." (55 F.2d at page 744)

Finally, there can be no doubt that counsel here have a vested right in the award of attorneys' fees which is entirely independent of Section 211(a). They were appointed at the request of the *pro se* plaintiffs, each of whom specifically authorized the court to make an allowance of attorneys' fees from any sums awarded them.[8] Without more, these facts entitled counsel, upon successful conclusion of the suits, to a special or charging lien for their services, such lien being founded on the equity of an attorney to be paid his fees and disbursements out of the judgment he obtains. The only prerequisite to the validity of an attorney's charging lien is either an express or implied contract between the attorney and his client. *Ingersoll* v. *Coram,* 211 U.S. 335, 53 L.ed 208 (1908); *De Winter* v. *Thomas,* 34 App. D.C. 80, 84 (1909), cert. den. 215 U.S. 609, 54 L.ed 347; and *Schmidt* v. *McCarthy,* 125 U.S. App. D.C. 131, 136, 369 F.2d 176, 181 (1966). The latter case makes the point which should be decisive here—that *it is within the sound discretion of the judge whether or not attorneys' fees are to be awarded.* Indeed, the Court can properly award attorneys' fees in order to prevent unjust enrichment. *United States* v. *Adamant Co.,* 197 F.2d 1, 10 (9th Cir. 1952), cert. den. 344 U.S. 903, 97 L.ed. 688 and *Freeman* v. *Ryan,* 133 U.S. App. D.C. 1, 408 F.2d 1204 (1968).

On either basis, counsel had valid liens on the respective funds which became vested when the District Court judgments which granted the Filipino widows' claims and brought the funds into existence became final.

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[8] In fact, both petitioners have agreed in writing to pay from their judgments the fees set by the District Court judges.

III.

Counsels' Vested Interests In Their Judgments And Liens Are Protected Against Impairment By The Due Process Clause Of The Fifth Amendment To The Unites States Constitution.

The opinion below discusses the subject of impairment of the obligations of contracts and concludes that Section 211(a) does not run afoul of that Constitutional provision (A. 31a-32a). In so doing, the Court below reasoned (1) that there was no contract with the government and even if counsel had valid contracts with petitioners the conclusion would be the same since counsel have no claim to payment from federal monies; (2) that veterans' benefits are gratuities and establish no vested rights; and (3) that Congress has provided an *administrative remedy* in Section 211(a) which is sufficient protection for individual rights (A. 30a-34a).

Reason 1 is fallacious because counsels' liens are based on services rendered their clients—not on contracts with the government and, as has been shown above, equitable liens will reach funds in the Treasury.

Reason 2 is a *non sequitur* for counsel worked diligently for a number of years in order to successfully conclude the petitioners' litigation. In a comparable situation where an attorney had won judgments for the Navajo Indian Tribes and the trial court held it "lacked jurisdiction" to award attorney's fees, the Sixth Circuit Court of Appeals, in reversing, stated:

> "We are *not* inclined to apply sovereign immunity to provide the tribe with free legal services . . .". (*Littel* v. *Morton,* 445 F.2d 1207 (6th Cir. 1971)).

Reason 3 is not persuasive since Section 211(a) does not in any way afford counsel an administrative remedy. Simply stated, counsel are not seeking reexamination of "Administrator's decisions"; they are seek-

ing to enforce causes of action for equitable relief. Obviously, if counsels' charging or equitable liens cannot be enforced in this case because of the amendment to Section 211(a) they cannot be enforced in any other proceeding—judicial or administrative.

The opinion below is in direct conflict with *McCullough* v. *Virginia,* 172 U.S. 102, 43 L.ed. 382 (1898). In *McCullough,* a state statute in 1871 provided that certain new coupon bonds would be receivable after maturity for taxes due the state. In 1882, the state passed a law which required the payment of taxes in "gold, silver, United States Treasury notes, national bank currency and nothing else." Judicial review was provided for anyone claiming such exaction was illegal. In 1892, McCullough, pursuant to such statutory authority, sued to establish the genuineness of certain coupons he had tendered in payment of taxes and judgment was rendered in his favor. Thereafter, and prior to decision on appeal, the General Assembly repealed the statute authorizing McCullough's suit. The Virginia Court of Appeals then reversed the decision favoring McCullough and ordered the Commonwealth's appeal dismissed. This Court, in reversing, held:

> "At the time the judgment was rendered in the circuit court of the city of Norfolk the act of 1882 was in force, and the judgment was rightfully entered under the authority of that act. The Writ of error to the court of appeals of the state brought the validity of that judgment into review, and the question presented to that court was whether at the time it was rendered it was rightful or not. If rightful the plaintiff therein had a vested right which no state legislation could disturb. It is not within the power of a legislature to take away rights which have been once vested by a judgment.

> Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislation to disturb the rights created thereby ceases. So, properly, the court of appeals, in considering the question of the validity of this judgment, took no notice of the subsequent repeal of the act under which the judgment was obtained, and the inquiry in this court is not what effect the repealing act of 1894 had upon proceedings initiated thereafter, or pending at that time, but whether such a repeal devested a plaintiff in a judgment of the rights acquired by that judgment. And in that respect we have no doubt that the rights acquired by the judgment under the act of 1882 were not disturbed by a subsequent repeal of the statute." (292 U.S. at pp. 123-24)

* * *

Here, counsels' charging liens and the judgment giving rise to them were rightfully entered by the District Court judges. The subsequent amendment of Section 211(a) could not constitutionally take away the rights acquired by those judgments. *Lynch* v. *United States,* 292 U.S. 571, 579, 78 L.ed. 1434 (1933), also teaches that the Fifth Amendment protects counsels' rights to the charging or equitable liens. Mr. Justice Brandeis' opinion in that case reemphasized the principle that:

> "Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened." (292 U.S. at page 580)

If the opinion below is allowed to stand, then the impairment of the remedy is tantamount to nullification of the right itself. A very pertinent case where

this Court would not allow a quasi-contractual claim to fail when the statute under which it arose was repealed is *Pacific M.S.S. Co.* v. *Joliffe,* 69 U.S. 450, 17 L.2d 805 (1865), where this Court said:

> "The claim of the plaintiff below for half pilotage fee, resting upon a transaction regarded by the law as a *quasi* contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute." (69 U.S. at pp. 457-458)

On the basis of the foregoing, it is clear that Section 211(a), as construed by the opinion below, could not divest counsel of the rights they acquired by contract with their clients and the trial court's judgments.

IV.

Respondents Did Not Have Standing To Appeal.

The judgments appealed from provided that the respective attorneys' fees were to be paid out of petitioners' awards—not in addition to them and certainly not from public monies. On these facts the government did not have an appealable interest because they were not aggrieved by the District Court judgments.

Appellate courts lack jurisdiction of an appeal taken by one who is not in a legal sense aggrieved. *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 100 L.2d 1081 (1956); *In re Michigan-Ohio Bldg. Corporation,* 117 F.2d 191 (7th Cir. 1941); and *United States*

v. *Adamant Co.*, 197 F.2d 1 (9th Cir. 1952), cert. den. 344 U.S. 903, 97 L.ed 688. The criteria of an appealable interest is set forth in *Michigan-Ohio* case:

> "We are faced at the outset with the question obtruding from the face of the record as to whether appellants have such an interest or are to such degree aggrieved as to create in them the right to appeal. Generally accepted is the legal tenet that no one may appeal from a judgment unless he has an interest therein, direct, immediate, pecuniary and substantial. Speaking more specifically, a party has an appealable interest only when his property may be diminished, his burdens increased or his rights detrimentally affected by the order sought to be reviewed." (117 F.2d at pp. 192-193)

In the *Adamant* case the Seventh Circuit held that the United States acting as a condemnor has no appealable interest in a judgment which apportioned among claimants the compensation awarded for the whole estate. Here the government's total liability was not affected. The judgment merely directed the division of the total judgment between petitioners and their attorneys. In such circumstances a defendant cannot appeal. *High Point Casket Co.* v. *Wheeler,* 182 N.C. 459, 109 S.E. 378 (1921) and *Clay County* v. *Manning,* 272 Ky. 66, 118 S.W.2d 129 (1938).

V.

The General Savings Statute Protects Counsels' Rights.

The savings statute, 1 U.S.C. § 109, in relevant part provides that "the repeal of any statute shall not have the effect to . . . extinguish any liability incurred under such statute, unless the repealing act shall so expressly provide . . ." Amended Section 211(a) does not expressly extinguish counsels' rights. Despite this, the

Court below erroneously concluded that even though the attorneys' fees were incurred under veterans' legislation the savings statute was not applicable since the repealing act "left the Administrator's liabilities outstanding and litigable, albeit in administrative proceedings." (A. 26a) This conclusion, as applied here, is wrong on two scores. First, counsel obviously have no administrative remedy. Second, this Court's opinion in *De la Roma Steamship Co.* v. *United States,* 344 U.S. 386, 97 L.ed. 422 (1953), requires the opposite conclusion. In *De La Rama,* the War Shipping Administration issued a policy of war risk insurance, an incident of which was a statutorily conferred right to prosecute an action for loss thereunder in a federal district court. Suit was brought for loss of a ship sunk by enemy action and during its pendency Congress repealed the legislation. This Court held that the case was saved by the general statute and that suit in the district court was proper despite the repeal. The same ruling should have been made here.

CONCLUSION

For the foregoing reasons, petitioners submit that their petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

STATUTES INVOLVED

The jurisdictional statute in effect at the time of the District Court's decision, 38 U.S.C. § 211(a), Act of September 2, 1958, Public Law No. 85-857, 72 Stat. 1115, provided:

> "Except as provided in Sections 784, 1661, 1761, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision."

After these cases had been argued on December 3, 1969 in the Court of Appeals, Congress passed the Act of August 12, 1970, Public Law No. 91-376, § 8(a), 84 Stat. 790, codified as 38 U.S.C. § 211(a), which provides:

> "On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

The General Savings Statute, 1 U.S.C. § 109, Act of July 30, 1947, Public Law No. 80-278, Ch. 388, § 1, 61 Stat. 633, provides:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the re-

pealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

The Fifth Amendment to the United States Constitution, in pertinent part, provides

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,947

PATROCINIA L. VDA DE RODULFA,

v.

UNITED STATES OF AMERICA AND ADMINISTRATOR OF VETERANS AFFAIRS, *Appellants*

No. 23,000

JULIANA CAPARAS VDA DEL ROSARIO

v.

UNITED STATES OF AMERICA AND DONALD E. JOHNSON, ADMINISTRATOR OF VETERANS AFFAIRS, *Appellants*

Appeals from the United States District Court for the District of Columbia

Decided March 24, 1972

Mr. David V. Seaman, Attorney, Department of Justice, with whom *Mr. Alan S. Rosenthal,* Attorney, Department of Justice, was on the brief, for appellants.

Mr. Henry F. Lerch for appellee in No. 22,947. *Mr. Robert L. Pillote* also entered an appearance for appellee in No. 22,947.

Mr. Harold J. Nussbaum for appellee in No. 23,000.

Before WRIGHT, MCGOWAN and ROBINSON, *Circuit Judges.*

ROBINSON, *Circuit Judge:* These cases arrived here as controversies over the propriety of awards of counsel fees for services on appellees' behalf while the litigation resided in the District Court. Each was a suit seeking recovery of benefits allegedly accruing under the veterans laws; each culminated in a judgment directing reinstatement of previously terminated installments of death compensation and deduction of the fees from the sums rein-

stated. Our consideration of the contest over the fees was interrupted, however, by the need to determine whether a change—while the appeals were under submission—in the statute governing judicial review of decisions of the Administrator of Veterans' Affairs on claims for noncontractual benefits deprives the courts of jurisdiction to deal with such matters. Concluding that it does, we vacate the fee awards and dismiss the appeals.

I

The de Rodulfa Case

Jose B. de Rodulfa, husband of one of the appellees, died in the line of duty while serving with the Philippine scouts in 1942. In 1945, his widow filed claims with the Veterans' Administration for wartime death compensation [1] and National Service Life Insurance benefits [2] for herself and the two minor children by her marriage to the decedent, and benefits of each kind were granted. After the application was submitted and before the benefits began, one of the children died. Mrs. de Rodulfa did not communicate this fact to the Veterans' Administration, and she accepted benefits on the deceased child's account.

In 1955, the Veterans' Administration discovered this change in the family's status and declared a forfeiture of the entire compensation award because of the failure to report the death and the acceptance of benefits for the child. On independent grounds, payments pursuant to the insurance award were also discontinued shortly thereafter.[3] Mrs. de Rodulfa appealed both terminations administratively, but the claims were finally denied in 1957.

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[1] 38 U.S.C. §§ 321, 322 (1970).

[2] 38 U.S.C. §§ 701 *et seq.* (1970).

[3] The ground of discontinuance was nonrecognition of Mrs. de Rodulfa as still the insured's unremarried widow. 38 U.S.C. § 802 (d)(2)(A) (1952). See also *de Sinlao* v. *United States*, 106 U.S.App.D.C. 263, 271 F.2d 846 (1959).

In 1965, Mrs. de Rodulfa filed in the District Court a *pro se* complaint against the United States seeking to have the benefits reinstated. She asked the court to appoint designated attorneys to represent her, and "to amend the complaint if necessary, and to deduct ten percentum (10%) from the claim as [her] attorney's fees if the claim is successful." The court granted the request for appointment of counsel, and allowed amendment of the complaint and joinder of the Administrator of Veterans' Affairs as a defendant. The amended complaint demanded restoration of the forfeited benefits and requested an allowance of counsel fees out of the recovery. The suit was resisted on a number of grounds, in large measure jurisdictional in character.[4]

The case was tried without a jury. The court dismissed the claim for National Service Life Insurance benefits as time-barred[5] but, declaring the Administrator's forfeiture of the compensation award to be "null and void," ordered reinstatement of those benefits by the Administrator. The court's judgment specifically directed payment of all wartime death compensation benefits "to date, and to become due," subject to credit for payments made on account of the deceased child and adjustments related thereto.[6] Counsel for Mrs. de Rodulfa thereafter filed a memorandum requesting an allowance of fees and the Government submitted an opposition. The court rendered an opinion rejecting the argument that statutory restrictions precluded a grant of counsel fees,[7] and entered an order amending the

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[4] Included was the claim that judicial review of the termination of wartime death compensation was barred by 38 U.S.C. § 211(a) (1964), discussed *infra* Part II.

[5] See 38 U.S.C. § 784(b) (1964). See also *Timoni* v. *United States*, 135 U.S.App.D.C. 407, 419 F.2d 294 (1969).

[6] Judgment against the United States was denied on the ground that it had not consented to be sued *eo nomine* for such benefits.

[7] *De Rodulfa* v. *United States*, 295 F.Supp. 28 (D.D.C. 1969).

judgment to provide for a fee of 25 percent "of all sums due and payable . . . pursuant thereto," to be withheld by the Administrator from monies due Mrs. de Rodulfa and paid to counsel. This appeal by the United States and the Administrator followed.[8]

The del Rosario Case

The companion case is very similar. Nicanor del Rosario died in 1942 in the military service of the United States. His widow applied in 1945 for and received benefits under the National Service Life Insurance and the wartime death compensation provisions for herself and her four minor children by the deceased serviceman. One of the children, however, had died before she filed the claim. This she did not report to the Veterans' Administration, and payments continued as though the child was alive. In 1954, these facts became known to the Administrator, who then forfeited her wartime death compensation award and established a continuing offset of accruing insurance benefits against the past overpayment of compensation.

After exhausting all administrative remedies without success, Mrs. del Rosario filed a *pro se* complaint in 1967 against the Administrator, with the United States as co-defendant, to compel resumption of the discontinued payments. The complaint asked that a named attorney be appointed by the court to represent her and "that he be awarded reasonable counsel fees for his services." The court made the requested appointment, and counsel later submitted a memorandum soliciting an allowance of fees. The case was ultimately disposed of, over jurisdictional objections,[9] by a final judgment on cross-motions for sum-

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[8] See notes 12-13, *infra*. Appellee did not cross-appeal from the parts of the judgment adverse to her.

[9] As in the *de Rodulfa* case, 38 U.S.C. § 211(a) was advanced as a barrier to judicial review of the administrative action. See Part II, *infra*.

mary judgment. The court denied an affirmative judgment on the insurance claim [10] but ordered the Administrator to reinstate and pay past due and future accruing wartime death compensation benefits for Mrs. del Rosario and her three remaining children, with a credit for unrecovered overpayments on the account of the deceased child and adjustments incidental thereto. The judgment, citing the opinion in *de Rodulfa*,[11] also allowed and required the Administrator to withhold 20 percent "of all sums due and payable . . . pursuant hereto" as the fees of her counsel.[12] The United States and the Administrator are here for review of the fee award.[13]

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[10] Since the insurance benefits had not been discontinued but were only being offset against the claimed compensation overpayment, restoration of the compensation award had the effect of automatically releasing withheld insurance benefits, so that a judgment for them was unnecessary.

[11] *Supra* note 7.

[12] In both cases, the appeals are only from the fee awards. See Part II, *infra*. Since no other parts of the judgments have been attacked here, appellees' wartime death compensation awards were reinstated. On the other hand, the portions of benefits attributable to counsel fees have been retained by the Administrator pending the outcome of the appeals.

[13] Appellees argued as a threshold matter that appellants lack an appealable interest. The emphatic answer appears from *Freeman* v. *Ryan*, 133 U.S.App.D.C. 1, 408 F.2d 1204 (1968). There we said:

> Where litigation involving federal programs comes to involve questions of attorney's fees the cognizant federal official has an interest in the fee award as well as the merits of the litigation even though, or assuming, the fee does not decrease funds in the Treasury.
>
> This has been indicated without discussion or debate in rulings of this court. We think it is one aspect of the interest of Government officials in the programs they administer, an interest that is not to be narrowly and technically confined so as to limit presentation to courts of issues they

II

When the District Court passed its judgments in these cases, 38 U.S.C. § 211(a) provided, with exceptions not relevant, that "the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive. . . ."[14] It further provided, with greater emphasis on nonreviewability, that "no other official or any court of the United States shall have power or jurisdiction to review any such decision."[15] We have never doubted that provisions of that sort jurisdictionally outlawed any judicial review of the Administrator's action taken upon a claim for non-

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consider to have significance in terms of their overall responsibilities as public officials.

Id. at 3, 408 F.2d at 1206. See also *SEC* v. *United States Realty & Improvement Co.*, 310 U.S. 434, 458-60 (1940); *Nuesse* v. *Camp*, 128 U.S.App.D.C. 172, 184, 385 F.2d 694, 706 (1967); *United States* v. *Snyder*, 85 U.S.App.D.C. 198, 203, 177 F.2d 44, 49 (1949).

[14] "Except as provided in Sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision." 38 U.S.C. § 211(a) (1964).

This version was substantially identical to its immediate forerunner. Act of October 17, 1940, 54 Stat. 1197. The exceptions, provided for in 38 U.S.C. §§ 775, 784 and chapter 37 of that title relate to contract matters—insurance and loan guaranties. Other counterparts in prior law were the Act of June 7, 1924, ch. 320, tit. I, § 9, 43 Stat. 610, and the Act of Mar. 20, 1933, ch. 3, tit. I, § 7, 48 Stat. 9.

[15] See note 14, *supra*.

contractual benefits when the claim was first presented.[16] However, in *Wellman* v. *Whittier* [17] in 1958, and in *Thompson* v. *Gleason* [18] four years later, this court read the word "claim" as referable only to a claimant's original application for benefits, and accordingly held that Section 211(a) did not render nonreviewable a decision by the Administrator to terminate benefits previously awarded. And in 1967, in *Tracy* v. *Gleason*,[19] the court solidified this construction by overruling three earlier cases [20] to the extent that they conflicted with it.[21] In its rulings in the instant cases, the District Court, very properly, remained advertent to the *Wellman-Thompson-Tracy* interpretation, and over objection [22] assumed jurisdiction to review the forfeitures which had occurred in each.

After the cases reached this court, they were briefed, argued, and submitted on the central question whether the District Court had authority to make awards of counsel fees in suits of their type, and if so whether the awards were reasonable in amount. While the cases were under

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[16] See *de Sibonga* v. *Administrator of Veterans' Affairs*, No. 24,156 (D.C. Cir. Feb. 28, 1972); *Slocumb* v. *Gray*, 86 U.S.App. D.C. 5, 8, 179 F.2d 31, 34 (1949); *Snauffer* v. *Stimson*, 81 U.S. App.D.C. 110, 111, 155 F.2d 861, 862 (1946). See also the cases cited *infra* note 21. The same conclusion had been reached under a prior statute. *Barnett* v. *Hines*, 70 App.D.C. 217, 220, 105 F.2d 96, 99, *cert. denied*, 308 U.S. 573 (1939).

[17] 104 U.S.App.D.C. 6, 11-12, 259 F.2d 163, 168-69 (1958).

[18] 115 U.S.App.D.C. 200, 207, 317 F.2d 900, 907 (1962).

[19] 126 U.S.App.D.C. 415, 418-20, 379 F.2d 469, 472-74 (1967).

[20] *De Sinlao* v. *United States*, *supra* note 3; *Hahn* v. *Gray*, 92 U.S.App.D.C. 188, 203 F.2d 625 (1953); *Van Horne* v. *Hines*, 74 App.D.C. 14, 122 F.2d 207, *cert. denied*, 314 U.S. 689 (1941).

[21] 126 U.S.App.D.C. at 419, 379 F.2d at 473.

[22] See notes 4, 9, *supra*, and accompanying text.

submission, however, Congress amended Section 211(a) to read as follows:

> On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.[23]

Thus a new question arose—the effect, if any, of the amendment upon these appeals. The parties have addressed this issue in extensive post-argument briefing. We ourselves have exhaustively researched and painstakingly examined the problem in each of its several ramifications.

It is important to identify, at the outset of consideration of this problem, just what are and what are not before us as the particular subjects of the appeals. In each case, the District Court awarded a judgment in favor of the widow-claimant directing the Administrator to remit all unpaid wartime death compensation benefits accrued to the date of judgment and all benefits of that type accruing thereafter.[24] In each, the court further directed that a percentage of all sums due and becoming due and otherwise payable to the claimants be withheld for payment to counsel as fees.[25] To be noted with the greatest care is the fact that appellants appealed—and thus brought before us—only so much of the judgments as awarded counsel fees,

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[23] Act of Aug. 12, 1970, Pub.L. No. 91-376, § 8(a), 84 Stat. 790, codified in 38 U.S.C. § 211(a) (1970).

[24] See text *supra* at note 6 and following note 10. As we have pointed out, each judgment was subject to a credit.

[25] See text *supra* at notes 7, 11-12.

leaving all other provisions—those ordering payments to the claimants—as they were.[26]

The latter is a consequence appellants fully realize. They argue that "[s]ince the specific counsel fees allowed by the court below were appealed and remain non-final, such awards must now be vacated and these cases remanded with directions to disallow all fees."[27] "But otherwise," appellants acknowledge, "the underlying judgments have not been brought before this Court. . . . Except as to the fees, therefore, we suggest that no action by this Court is presently indicated."[28]

We agree that the judgments exclusive of the fee awards—that is, the portions directing payment of benefits to the widow-claimants—are beyond the purview of these appeals. Those portions are adjudications by the District Court that became final, because they were not appealed, before the change in Section 211(a) was forthcoming. Nothing we can do on the present appeals can affect them, and nothing we say now is intended to reflect upon them.[29] We also agreed that the fate of the fee

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[26] This has been clear from the very beginning. In their opening brief appellants announced, and ever since they have consistently recognized, that "[t]he Government appeals only from the fee allowances." Brief for Appellants at 3. See also note 12, *supra*, and text *infra* at notes 27-28.

[27] Supplemental Brief for Appellants at 3.

[28] Supplemental Brief for Appellants at 8.

[29] Appellants say in this connection:

> We are still studying what position the Government should take with regard to Mrs. Rodulfa's and Mrs. Rosario's own portions of the judgments (as distinguished from the claims of their counsel), based upon the recent legislation. However, since the instant appeals were limited to fee awards, we have decided that any attack on those remaining portions must be presented (if at all) to the district court in the first instance.

Supplemental Brief for Appellants at 7.

awards, in terms of amended Section 211(a), depends upon the effect the amendment would legitimately have exerted upon so much of the benefits as underlay such awards if the benefits themselves were the subject of appeal.

The fees were simply incidents of the litigation in the District Court, which centered on alleged error in the Administrator's termination of wartime death compensation being paid to the widow-claimants. Payment of the fees was directed only because the District Court adjudged that the Administrator's action was erroneous, and because that adjudication, in turn, provided a source from which payment of the fees could be made. Under the terms of the court's judgments, the fees were payable from monies which otherwise would have gone to the widows, and the monies representing the fee awards are held by appellants. The parts of the judgments awarding the fees have always been the targets of these appeals—now on the ground that this court lacks jurisdiction to do aught but leave the Administrator's ruling standing as to so much of the judgments as have not achieved finality. In the words of Justice Holmes in a similar context, "[w]here the root is cut the branches fall;"[30] and if indeed the amendment of Section 211(a) severed the root of the litigation, the branch dealing with counsel fees must tumble likewise.

III

Prospective rather than retrospective application is decidedly the preferred judicial treatment of legislation. "Retroactivity," the Supreme Court has declared, "even when permissible, is not favored, except upon the clearest mandate,"[31] and we ourselves have echoed the same

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[30] *Smallwood* v. *Gallardo*, 275 U.S. 56, 62 (1927).

[31] *Claridge Apartments Co.* v. *Commissioner*, 323 U.S. 141, 164 (1944).

maxim.[32] Thus "statutes are not to be applied retroactively 'unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot otherwise be satisfied.' "[33] This canon, moreover, responds to a special call when the legislation under consideration is antithetical to previously arising economic expectancies. For quite obvious reasons, "a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' "[34]

These all, however, are but principles of construction available for service when the legislative intention is open to some doubt. Courts exist to minister, not beget, legislative objectives, and to effectuate them once they are definitely identified. Judges have responsibility, not for the wisdom of the legislation, but surely for scrupulous observance of the legislative will. And "[w]hen the Congress plainly intends retrospective effect, . . . the courts must interpret the enactment accordingly, unless to do so would result in a clear infraction of a constitutional provision."[35] Congress, in its recent amendment of Section

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[32] *Kalis* v. *Leahy*, 88 U.S.App.D.C. 166, 167-68, 188 F.2d 633, 634-35, *cert. denied*, 341 U.S. 926 (1951); *Neild* v. *District of Columbia* 71 App. D.C. 306, 314, 110 F.2d 246, 254 (1940).

[33] *Boilermakers Int'l* v. *NLRB*, 114 U.S.App.D.C. 372, 374, 316 F.2d 373, 375 (1963), quoting *United States Fidelity & Guar. Co.* v. *United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908).

[34] *Greene* v. *United States*, 376 U.S. 149, 160 (1964), quoting *Union Pac. R.R.* v. *Laramie Stockyards Co.*, 231 U.S. 190, 199 (1913), in turn quoting *United States* v. *Heth*, 7 U.S. (3 Cranch) 399, 413 (1806). See also *Vito* v. *Vito*, 106 U.S.App.D.C. 326, 328, 272 F.2d 555, 557 (1959).

[35] *Kindleberger* v. *Lincoln Nat'l Bank*, 81 U.S.App.D.C. 101, 106, 155 F.2d 281, 286 (1946), *cert. denied*, 329 U.S. 809 (1947). See also *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 477-78 (1899).

211(a), made it crystal clear that its goal was to exclude from judicial review all administrative forfeitures of previously awarded noncontractual benefits, whether drawn into pending litigation or not. That conclusion we draw from the legislative history of the amendment and from its present text as well.

The change was initiated by the House Committee on Veterans' Affairs, and the Committee's report illumines both the problem it addressed and the solution it proposed. It called attention to the fact that "[f]or many years before 1958, based on statutory provisions similar to that now appearing as 38 U.S.C. 211(a), the Federal courts held that decisions of officials responsible for administering laws providing noncontractual benefits to veterans and their dependents and survivors were not subject to judicial review." [36] Adverting to the text of the then current Section 211(a), the Committee felt that "[t]his language would seem to be perfectly clear in expressing the congressional intent that any and all decisions of the Administrator on questions of entitlement to veterans' benefits (except for certain contractual benefits which were specifically excluded from the application of this provision) were to be final and not subject to judicial review." [37]

The Committee then referred to the *Wellman-Thompson-Tracy* exception to nonreviewability developed in this circuit [38] and to the door those cases had opened to judicial review. The Committee had before it a report from

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[36] H.Rep. No. 91-1166, 91st Cong., 1st Sess. 8 (1970) [hereinafter cited 1970 House Report].

[37] 1970 House Report, *supra* note 36, at 9.

[38] 1970 House Report, *supra* note 36, at 9-10. See text *supra* at notes 17-21.

the Administrator,[39] which it appended to its own report [40] describing vividly the effects which *Tracy* had wrought. "[S]oon after the *Tracy* decision," said the Administrator, "suits in the nature of mandamus or for declaratory judgment commenced to be filed in the U.S. District Court for the District of Columbia in constantly increasing numbers by plaintiffs seeking resumption of terminated benefits. As of March 8, 1970, 353 suits of this type had been filed in the District of Columbia circuit." [41] "[I]t seems obvious," the Administrator continued, "that suits similar to the several hundred already filed can—and undoubtedly will—subject nearly every aspect of our benefit determinations to judicial review, including rating decisions, related Veterans' Administration regulations, Administrator's decisions, and various adjudication procedures." [42]

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[39] The Administrator's report, dated June 9, 1970, was furnished in connection with another bill which would have dealt with the problem by redefining the word "claim" as used in the older section. See text *supra* at notes 17-18.

[40] 1970 House Report, *supra* note 36, at 19-24.

[41] 1970 House Report, *supra* note 36, at 21.

[42] 1970 House Report, *supra* note 36, at 23-24. The Administrator added:

> Moreover, in the cases considered so far, the U.S. District Court has not been governed by the time limitations and conditions usually applicable under Federal statutes and rules governing suits against the United States or its officials when specific statutory authority has been granted for judicial review. One consequence of this is that judgments for retroactive benefits of over $18,000 for installments accruing from a period commencing as early as the 1940's have been rendered, and these judgments have also ordered the Administrator to deduct as much as 25 percent attorneys' fees from the benefits due and to become due. The scope of the *Tracy* decision and the decisions upon which it is based is so broad that it could well afford a basis for judicial review of millions of decisions terminating or reducing many types of benefits provided under laws administered by the Veterans' Administration.

These data the Committee duly noted: "Since the decision in the *Tracy* case—and as the result of that decision and the *Wellman* and *Thompson* decisions—suits in constantly increasing numbers have been filed in the U.S. District Court for the District of Columbia by plaintiffs seeking a resumption of terminated benefits."[43] After describing summarily the variety of questions which had been subjected to judicial scrutiny, the Committee concluded:

> It seems to this committee that it is quite clear that the Congress, in enacting the exemption from judicial review in [Section 211(a)], Congress, intended that exemption to be all inclusive and did not intend the fairly tortured construction adopted by the court of appeals in the *Wellman, Thompson,* and *Tracy* holdings. It is obvious that if the Congress had intended to authorize judicial review, it would not have adopted a form so inherently unfair as to deny review of any original claim for benefits; providing no time limitation or conditions governing such suits against the United States and its officials; and, contrary to all past practice in the veterans' benefits field (see 38 U.S.C. 784(g) and 3404(c)), establishing no limitation on attorney fees.
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> In view of the foregoing, this committee has included in . . ., a new subsection . . . which restates

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Such review might even extend to the decisions of predecessor agencies made many years ago. On the other hand, this judicially authorized form of review is inherently unfair since it does not permit review of any decisions denying an original claim for benefits.

Officials of the Department of Justice have expressed grave concern regarding the scope and volume of litigation stemming from the *Tracy* decision. This, of course, is also a matter of great concern to the Veterans' Administration.

1970 House Report, *supra* note 36, at 24.

[43] 1970 House Report, *supra* note 36, at 10.

the provisions of subsection 211(a) of title 38, United States Code, to eliminate the word "claim" from that subsection. The restated subsection will provide that except for certain contractual benefits, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise. The provision is specifically made effective October 17, 1940, the date of enactment of [Section 211(a)]. The committee believes that this approach to solving the problem is preferable to . . ., i.e., adding a definition of the word "claim" to title 38, United States Code. The restated section 211(a) will make it perfectly clear that the Congress intends to exclude from judicial review all determinations with respect to noncontractual benefits provided for veterans and their dependents and survivors.[44]

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[44] 1970 House Report, *supra* note 36, at 10-11. Consistently therewith, Congressman Teague, the patron of the amendment, remarked on the floor of the House:

> The reason for the inclusion of section 8 in this bill is because a recent court decision gave preferential treatment to a limited group of beneficiaries. If we are going to have court review it must apply to all beneficiaries with equal force. This the court is unable to do under existing law and sought to do in piecemeal fashion and, in my opinion, erroneously.
>
> This provision in section 8 was supported unanimously in our committee. As far as I know, the same can be said for the committee in the other body.
>
> I am opposed to a windfall going to a particular class of beneficiaries or a particular group of lawyers who have interested themselves in the type of cases which are involved in this question and which are set forth in detail in the report on this bill which is House Report No. 91-1166 on H.R. 17958, the contents of which were substituted for S. 3348.

116 Cong.Rec. H 7424 (July 30, 1970).

The language Congress chose in amending Section 211(a) evinces the congressional will all the plainer. It makes "the decisions of the Administrator" in matters involving noncontractual benefits "final and conclusive" and denies to the courts "power or jurisdiction to review any such decision," not simply for the future but "[o]n and after October 17, 1940," [45] the date upon which the older Section 211(a) became law. We cannot reconcile the specification in the amended section of a date almost 30 years earlier with any notion that Congress intended these proscriptions to apply only to litigation commenced from the date of amendment forward. We see no purpose to be served by reaching back to the effective date of the older finality statute than to impart to it a meaning Congress felt it should always have had. That objective could be achieved only by intercepting noncontractual claims already in court as well as those that had not arrived, and that is obviously what Congress did. We hold that Section 211(a) in amended form was directed at pending as well as future judicial reviews of the Administrator's determinations on claims for noncontractual benefits.

IV

While, in the cases at bar, the amendment of Section 211(a) did not occur until after rendition of the judgments encompassing the awards of counsel fees,[46] that circumstance does not grant us liberty to ignore the statutory alteration which Congress has decreed. "A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law," [47] for rea-

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[45] See text *supra* at note 23.

[46] Compare *Ziffrin* v. *United States*, 318 U.S. 73, 78 (1943) (change of statutory law pending administrative decision); *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 464 (1921) (statutory change pendente lite). See also cases cited *infra* note 54.

[47] *Ziffrin* v. *United States*, *supra* note 46, 318 U.S. at 78.

sons which, in *United States* v. *Schooner Peggy*,[48] Chief Justice Marshall had occasion to articulate:

> [I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.[49]

And in the 170-odd years since *Schooner Peggy*, the decisions honoring changes pendente lite, whether in federal[50]

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[48] 5 U.S. (1 Cranch) 103 (1801).

[49] *Id.* at 110.

[50] *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281-83 (1969) (change in administrative regulation); *Hines* v. *Davidowitz*, 312 U.S. 52, 60 (1941) (intervening statute); *Carpenter* v. *Wabash Ry.*, 309 U.S. 23, 27 (1940) (intervening statute); *American Steel Foundries* v. *Tri-City Cent. Trades Council*, 257 U.S. 184, 201 (1921) (intervening statute); *Dinsmore* v. *Southern Express Co.*, 183 U.S. 115, 119-21 (1901) (intervening statute); *United States* v. *Preston*, 28 U.S. (3 Pet.) 57, 66-67 (1830), (intervening statute); *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 625 (1813) (intervening treaty); *Schaff* v. *R. W. Claxton, Inc.*, 79 U.S.App.D.C. 207, 208, 144 F.2d 532, 533 (1944) (intervening judicial decision); *District of Columbia* v. *American Pharmaceutical Ass'n*, 77 U.S.App.D.C. 94, 133 F.2d 43 (1942) (intervening statute); *Van Horne* v. *Hines*, *supra* note 20, 74 App.D.C. at 216, 122 F.2d at 209 (intervening statute). See also *Dorchy* v. *Kansas*, 264 U.S. 286, 289 (1924); *Watts, Watts & Co.* v. *Unione Austriciaca Di Navigazione*, 248 U.S. 9, 21 (1918); *Ruppert* v. *Ruppert*, 77 U.S.App.D.C. 65, 68, 134 F.2d 497, 500 (1942).

or state[51] law, are legion. It is much too late in the day to indulge any notion that we are not bound to give the new Section 211(a) all the vigor Congress had in mind.

These appeals face, too, not changes merely affecting the merits of the cases or their procedural incidents, but what is indeed a complete withdrawal of jurisdiction to reexamine any determination by the Administrator in war-time death compensation cases. Amended Section 211(a) restores the law in this circuit to its pre-*Wellman* condition;[52] it sets for naught the exception to nonreviewability which the *Wellman* line of opinions had carved out for administratively forfeited compensation awards. It now makes it perfectly plain that no court has authority to disturb in any way the Administrator's disposition of any claim therefor.[53]

There is hardly room for doubting that had Section 211(a) been so amended before these cases had run their course in the District Court, it would have foreclosed any judgment favorable to the claimants.[54] That the judg-

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[51] *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941) (intervening judicial decision); *Sioux County* v. *National Sur. Co.*, 276 U.S. 238, 240 (1928) (intervening judicial decision); *Missouri ex rel. Wabash Ry.* v. *Public Serv. Comm'n*, 273 U.S. 126, 130-31 (1927) (intervening statute); *Texas Co.* v. *Brown*, 258 U.S. 466, 474 (1922) (intervening statute); *Metzger Motor Car Co.* v. *Parrot*, 233 U.S. 36, 41-42 (1914) (intervening judicial decision); *Gulf, C. & S. F. Ry.* v. *Dennis*, 224 U.S. 503, 505-09 (1912) (intervening judicial decision); *Moores* v. *National Bank*, 104 U.S. 625, 629 (1882) (intervening judicial decision); *Kibbe* v. *Ditto*, 93 U.S. 674 (1877) (intervening judicial decision). See also *Oklahoma Packing Co.* v. *Oklahoma Gas Co.*, 309 U.S. 4, 7-8 (1940); *Patterson* v. *Alabama*, 294 U.S. 600, 607 (1935).

[52] See text *supra* at notes 17-21.

[53] See Part III, *supra*.

[54] "[A] repealing statute which contains no saving clause operates as well upon pending cases as upon those thereafter commenced." *Gwin* v. *United States*, 184 U.S. 669, 675 (1902). Numerous cases are in accord. See *United States* v. *Chambers*, 291

ments antedated the amendment makes for no difference in result as to so much of the judgments as were brought here for review. Amended Section 211(a) is as much a dissolution of our jurisdiction as it was of the District Court's,[55] and "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law. . . ."[56] It is clear to us beyond peradventure that these appeals fell when Congress changed Section 211(a).

Three decades ago, we dealt similarly with the very problem which we encounter today. In *Van Horne* v. *Hines*,[57] the Veterans' Administration terminated an award of disability compensation previously made in favor of a

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U.S. 217 (1934) (repeal of Eighteenth Amendment, liquidating pending prosecutions for violation of National Prohibition Act); *The Assessor* v. *Osborne* (*Gates* v. *Osborne*), 76 U.S. (9 Wall.) 567 (1870) (repeal of statute conferring jurisdiction); *Hornthall* v. *Collector*, 76 U.S. (9 Wall.) 560 (1870) (same); *Norris* v. *Crocker*, 54 U.S. (13 How.) 429, 440 (1852) (same); *United States* v. *Ship Helen*, 10 U.S. (6 Cranch) 203 (1810) (same). See also *Gurnee* v. *Patrick County*, 137 U.S. 141 (1890); *Wilkinson* v. *Nebraska*, 123 U.S. 286 (1887); *The Lucy*, 75 U.S. (8 Wall.) 307 (1869); *McNulty* v. *Batty*, 51 U.S. (10 How.) 72 (1850).

[55] See text *supra* at notes 29-30 and Part III, *supra*.

[56] *Bruner* v. *United States*, 343 U.S. 112, 116-17 (1952). See also Part V, *infra*. This rule has seen frequent application in cases wherein a statute negating jurisdiction became effective pending appeal. *Smallwood* v. *Gallardo*, *supra* note 30, 275 U.S. at 60-62; *Western Union Tel. Co.* v. *Louisville & N. R.R.*, 258 U.S. 13, 18, 22 (1922); *Crozier* v. *Krupp*, 224 U.S. 290, 302-09 (1911); *Sherman* v. *Grinnell*, 123 U.S. 679 (1887); *Railroad Co.* v. *Grant*, 98 U.S. 398 (1879); *United States* v. *Tynen*, 78 U.S. (11 Wall.) 88, 95 (1871); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); *Insurance Co.* v. *Ritchie*, 72 U.S. (5 Wall.) 541 (1867); *United States* v. *Preston*, 28 U.S. (3 Pet.) 57, 66 (1830). See also *Schooner Rachel* v. *United States*, 10 U.S. (6 Cranch) 329 (1810) (expiration of law conferring jurisdiction); *Yeaton* v. *United States*, 9 U.S. (5 Cranch) 281 (1809) (same).

[57] *Supra* note 20.

World War I veteran, whereupon the latter sued the Administrator in the District Court for recovery of benefits which otherwise were payable thereafter. The District Court awarded the Administrator summary judgment, the veteran appealed, and while the appeal was pending the 1940 version of Section 211(a) was enacted.[58] The Administrator then moved for dismissal of the appeal for lack of jurisdiction, urging that the section "has the effect of depriving the courts of jurisdiction to review decisions of the Administrator in all cases and notwithstanding the appeal, as in the present case, was perfected prior to the time of its enactment."[59] We granted the motion, stating:

> We think the Administrator's position is correct. . . . [The] benefits may be withdrawn at any time by act of Congress, and to make the withdrawal effective, Congress may in turn withdraw jurisdiction from the courts over decisions of the Administrator in relation thereto. . . . If, therefore, Congress has by the passage of the act withdrawn jurisdiction, it is of no consequence that the Act became effective after the trial below and during the pendency of the appeal in this court, for the rule is well established that, where jurisdiction conferred by statute is prohibited by a later statute, jurisdiction ceases and causes pending at the time of the later enactment must be dismissed.[60]

We are, of course, mindful of holdings that a change of law does not retroactively affect a proceeding which has already been terminated by a final judgment prior to the change.[61] As the Supreme Court has admonished, "[i]t is

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[58] See note 14, *supra*, and accompanying text.

[59] 74 App.D.C. at 215-16, 122 F.2d at 208-09.

[60] *Id.* at 216, 122 F.2d at 209.

[61] See *Hodges* v. *Snyder*, 261 U.S. 600, 603-04 (1923); *McCullough* v. *Virginia*, 172 U.S. 102, 123-24 (1898); *Gray* v. *Chicago, I. & N. R.R.* (*The Clinton Bridge*), 77 U.S. (10 Wall.) 454, 463

not within the power of a legislature to take away rights which have been once vested by a judgment."[62] For "[l]egislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgments, the power of the legislature to disturb the rights created thereby cease."[63] It is evident, however, that these precedents have no application here since, owing to the instant appeals, the awards of counsel fees have never become final. Surely counsel had no immutable right to payment of compensation from government funds at any time prior to the entry of the judgments in the District Court.[64] Nor did they acquire such a right merely by virtue of the District Court's awards, which appellants

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(1870); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431, 436 (1856). See also *Thorpe* v. *Housing Authority*, *supra* note 50, 393 U.S. at 282 n.43; *Greene* v. *United States*, *supra note* 34, 376 U.S. at 160-61; *Pope* v. *United States*, 323 U.S. 1, 7-9 (1944); *Western Union Tel. Co.* v. *Louisville & N. R.R.*, *supra* note 56, 258 U.S. at 19-20; *Massingill* v. *Downs*, 48 U.S. (7 How.) 760, 768 (1849). *Cf. Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 310-11 (1945); *James* v. *Appel*, 192 U.S. 129, 136-37 (1904).

The rule stated in text is subject to an exception in the case of a "public right," which even after its establishment by a judgment may be altered by subsequent legislation. *Hodges* v. *Snyder*, *supra*, 261 U.S. at 603-04 (injunction against maintenance of illegal school district and issuance of its bonds); *Western Union Tel. Co.* v. *Louisville & N. R.R.*, *supra* note 56, 258 U.S. at 19-20 (exertion of power of eminent domain in the public interest); *Rafferty* v. *Smith, Bell & Co.*, 257 U.S. 226, 232 (1921) (restitution of taxes allegedly illegally collected); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, *supra*, 59 U.S. (18 How.) at 431-36 (abatement of obstruction to navigation of river). See also *Gray* v. *Chicago, I. & N. R.R.* (*The Clinton Bridge*), *supra*, 77 U.S. (10 Wall.) at 462-63. In the view we take of the instant cases, it is unnecessary to consider whether the District Court's judgments would in any event be subject to this exception.

[62] *McCullough* v. *Virginia*, *supra* note 61, 172 U.S. at 123.

[63] *Id.* at 123-24.

[64] See text *infra* at notes 93-97.

have made the object of these appeals. "An appeal is not a new suit in the appellate court, but a continuation of the suit in the court below;" [65] it is "a proceeding in the original cause," [66] and as such "is but a step toward the final adjudication of the original cause which the law allows quite as much as its allows a defense in the first instance." [67] Thus "the suit is pending until the appeal is disposed of," [68] and until disposition any judgment appealed from it is still *sub judice*.[69] While so remaining, the portions of the judgments in these cases granting counsel fees were not investitures of rights ipso facto unalterable by the legislature.[70]

V

Counsel urge, however, that these appeals survived the amendment of Section 211(a) by reason of the General Savings Statute.[71] That statute in relevant part specifies that "[t]he repeal of any statute shall not have the effect to release or extinguish any . . . liability incurred under such statute, unless the repealing Act shall so expressly provide," and that "such statute shall be treated as still remaining in force for the purpose of sustaining any proper

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[65] *Gulf Ref. Co.* v. *United States*, 269 U.S. 125, 137 (1925).

[66] *Mackenzie* v. *A. Engelhard & Sons Co.*, 266 U.S. 131, 142 (1924).

[67] *Gulf Ref. Co.* v. *United States*, *supra* note 65, 269 U.S. at 137.

[68] *Mackenzie* v. *A. Engelhard & Sons Co.*, *supra* note 66, 266 U.S. at 142-43.

[69] *Gulf, C. & S. F. Ry.* v. *Dennis*, *supra* note 51, 224 U.S. at 505.

[70] See *Smallwood* v. *Gallardo*, *supra* note 30, 275 U.S. at 61; *Western Union Tel. Co.* v. *Louisville & N. R.R.*, *supra* note 56, 258 U.S. at 18, 22; *Rafferty* v. *Smith, Bell & Co.*, *supra* note 61, 257 U.S. at 232; *American Steel Foundries* v. *Tri-City Cent. Trades Council*, *supra* note 50, 257 U.S. at 201; *Freeborn* v. *Smith*, 69 U.S. (2 Wall.) 160, 174-75 (1865). See also *Gwin* v. *United States*, *supra* note 54, 184 U.S. at 674; *Railroad Co.* v. *Grant*, *supra* note 56, 98 U.S. at 401-02.

[71] 1 U.S.C. § 109 (1970), quoted *infra* note 72.

action . . . for the enforcement of such . . . liability. . . ." [72] The argument is that the Administrator's liability, which arose, if at all, before Congress changed Section 211(a), remains outstanding despite the change and makes a call upon the courts to enforce it. Upon examination, we find this contention to be unacceptable.

Initially, one may wonder just how the obligation asserted on appeal—for the payment of counsel fees—could be deemed a liability "incurred under" Section 211(a) in its pre-amendment formulation. For, in sharp contrast to the statutory provisions generating liability for the benefits inuring to their clients as widows of deceased veterans,[73] that section had nothing whatever to do with counsel fees. Moreover, no provision of the veterans laws attracting our attention during extensive independent research goes to the matter of counsel fees for in-court service in connection with wartime death compensation claims. This is but another way of saying that any "liability" for such fees must seek its source outside the scheme of those laws.[74]

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[72] "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." 1 U.S.C. § 109 (1970). This provision has endured in substantially the same form for more than a century. See Act of Feb. 25, 1871, ch. 71, § 4, 16 Stat. 432.

[73] And, of course, to surviving dependents of deceased veterans.

[74] We do not suggest that for this reason alone a court could not make award of reasonable counsel fees if it had jurisdiction to act in the premises. We simply do not pass on the question.

But even if an obligation to compensate counsel was "incurred under" veterans legislation—and the underlying liability to the clients and their children surely was—the end result is the same. There is a great difference, in terms of the General Savings Statute, between the amendment or repeal of a statute which confers substantive rights and, on the other hand, one which removes the jurisdiction of the court to review administrative adjudications of rights. The modification Congress effected by amended Section 211(a) did not "release or extinguish" any liability the Administrator had either to compensation beneficiaries or to their lawyers; rather, it left the Administrator's liabilities outstanding and litigable, albeit in administrative proceedings. That it sealed off judicial review of the administrative action did not bring the General Savings Statute into play. So much the precedents make abundantly clear.

In *Bruner* v. *United States*,[75] a civilian fire chief employed at a military installation sued the Government in a federal district court for overtime compensation, invoking a provision of a statute conferring concurrent jurisdiction on district courts and the Court of Claims over certain civil actions against the United States. Congress had also provided, however, that nothing in the statute should be taken as a grant to district courts of jurisdiction of cases brought to recover fees, salary, or compensation for official services of "officers" of the United States. The plaintiff's theory was that he was not an "officer," but only an "employee," of the United States, and so was not affected by the jurisdictional exclusion. After the case had reached the Supreme Court, Congress expanded the exclusion to embrace federal employees as well as federal officers, thereby relegating suits by either to the Court of Claims, without any reservation of jurisdiction over pendings cases. The Court rejected the contention that the Gen-

[75] *Supra* note 56.

eral Savings Statute sustained the litigation. "Congress has not altered the nature or validity of petitioner's rights or the Government's liability," the Court said, "but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities." [76]

It cannot be doubted that the same conclusion follows where the tribunal to which the litigation is confined is an administrative agency. In *Hallowell* v. *Commons*,[77] suit was brought in a federal district court to establish an equitable title in the alleged heirs of an intestate Indian allottee of land held in trust for him by the United States. Thereafter, Congress passed a law requiring the Secretary of the Interior to ascertain allottees' heirs and provided, without exception for pending cases, that the Secretary's decision would be final and conclusive. In dismissing the argument that the General Savings Statute kept the action alive, the Supreme Court pointed out that "the reference of the matter to the Secretary . . . takes away no substantive right, but simply changes the tribunal that is to hear the case." [78] "In doing so," the Court added, "it evinces a change of policy, and an opinion that the rights of the Indians can be better preserved by the quasi paternal supervision of the general head of Indian affairs." [79]

The cases before us, then, are not of the type that the General Savings Statute safeguards against statutory amendments or repeals. The vital difference between an alteration of substantive legislation, to which the statute might apply, and legislation wholly jurisdictional in character is vividly illustrated by *De La Rama Steamship Company* v. *United States*.[80] During World War II, the

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[76] 343 U.S. at 117.

[77] 239 U.S. 506 (1916).

[78] *Id.* at 508.

[79] *Id.*

[80] 344 U.S. 386 (1953).

War Shipping Administration issued a policy of war risk insurance, an incident of which was a statutorily conferred right to prosecute an action for loss thereunder in a federal district court. Suit was brought for loss of a ship sunk by enemy action and during its pendency Congress repealed the legislation. The Supreme Court held that the case fell within the purview of the General Savings Statute, but in doing so carefully distinguished cases like those at bar. The Court said:

> The Government rightly points to the difference between the repeal of statutes solely jurisdictional in their scope and the repeal of statutes which create rights and also prescribe how the rights are to be vindicated. In the latter statutes, "substantive" and "procedural" are not disparate categories; they are fused components of the expression of a policy. When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. . . . If the aim is to destroy a tribunal or take away cases from it, there is no basis for finding saving exceptions unless they are made explicit.[81]

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[81] Id. at 390. The Court added:

> But where the object of Congress was to destroy rights in the future while saving those which have accrued, to strike down enforcing provisions that have special relation to the accrued right and as such are part and parcel of it, is to mutilate that right and hence to defeat rather than further the legislative purpose. The Government acknowledges that there were special considerations, apart from the matter of interest, for giving the insured under the War Risk Insurance Act access to the district courts rather than relegating him to the Court of Claims. In repealing the War Risk Insurance Act among numerous other statutes, Congress was concerned not with jurisdiction, not with the undesirability of the district courts and the suitability of the Court of Claims as a forum for suits under that Act. It was concerned with terminating war powers after the "shooting war" had terminated.

Id. at 390-91.

The right to compensation consequent upon a veteran's death in wartime service is a creature of statute. Congress has provided, as the mechanism for consideration and disposition of claims for such compensation, a proceeding before the Veterans' Administration. Prior to the amendment of Section 211(a), the District Court's jurisdiction to review the Administrator, and our own jurisdiction to review the District Court, rested wholly upon the construction this court had placed on the section in forfeiture cases.[82] The amendment annulled that construction,[83] whereupon jurisdiction to reinstate forfeited benefits was lost, and with it jurisdiction to award counsel fees out of restored benefits.[84] We hold that the General Savings Statute lends no assistance to these appeals.

VI

In holding that the amendment of Section 211(a) defeats the counsel fee awards made by the District Court, we do not mean to imply that the Constitution leaves for Government an unrestricted range when it engages in doling out public funds. "To characterize an act of Congress as conferring a 'public benefit' does not, of course, immunize it from scrutiny under the Fifth Amendment,"[85] nor does it license Congress to "exercise its power to modify the statutory scheme free of all constitutional restraint."[86] The interest of a potential recipient may well be "of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due

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[82] See text *supra* at notes 17-21.

[83] See Part II, *supra*.

[84] See Part III, *supra*.

[85] *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971). See also *Goldberg* v. *Kelly*, 397 U.S. 254, 261-63 (1970).

[86] *Fleming* v. *Nestor*, 363 U.S. 603, 611 (1960).

Process Clause." [87] That interest may also command the respect which due process of law enjoins even in matters purely procedural in character.[88]

But due process in this area does not mean inexorably that a recipient has "such a right in benefit payments as would make every defeasance of 'accrued' interests" a violation.[89] "Nor," of course, "does an expectation interest in public benefits confer a contractual right to receive the expected amounts." [90] And while "[i]t may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity,' " [91] "the analogy drawn . . . between social welfare and 'property' . . . cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." [92]

Counsel have not undertaken to identify any constitutional impediment to operation of amended Section 211(a) upon their claims for compensation, nor do we perceive any. Members of the bar who voluntarily serve indigent parties in meritorious litigation honor one of the noblest traditions of the legal profession, and for that they deserve the highest commendation. They also earn sympathetic consideration by the courts of requests for reasonable recompense in situations wherein the courts are empowered to entertain them. The fact remains, nonetheless, that no right to compensation from public monies for legal services rendered private litigants springs from the Con-

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[87] *Id.* See also *Richardson* v. *Belcher, supra* note 85, 404 U.S. at 81.

[88] *Goldberg* v. *Kelly, supra* note 85, 397 U.S. at 261-65.

[89] *Richardson* v. *Belcher, supra* note 85, 404 U.S. at 80. See also *Fleming* v. *Nestor, supra* note 86, 363 U.S. at 611.

[90] *Richardson* v. *Belcher, supra* note 85, 404 U.S. at 80.

[91] *Goldberg* v. *Kelly, supra* note 85, 397 U.S. at 262 n.8.

[92] *Richardson* v. *Belcher, supra* note 85, 404 U.S. at 81.

stitution,[93] and that the service levies on the federal treasury only in the event and to the extent that a statute authorizes it.[94] It is largely because of these considerations that any endeavor to pin a constitutional violation on amended Section 211(a)'s destruction of the withheld compensation benefits as a fund from which counsel fees might have been paid in these cases is almost immediately doomed to failure.

We have no question of impairment of the obligations of a preexisting contract.[95] As to the Government there was none, and even if counsel had valid contractual arrangements with their clients for payments of fees, that conclusion would not be altered. Counsel, as we have said, have no claim to payment from federal monies, and no contract with their clients could confer such a right. And while a vested cause of action, whether emanating from contract or common law principles, may constitute property beyond the power of the legislature to take away,[96]

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[93] *United States* v. *Dillon*, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); *Jackson* v. *State*, 413 P.2d 488, 490 (Sup.Ct. Alaska 1966); *State* v. *Clifton*, 247 La. 495, 172 So.2d 657, 667 (1965); *State* v. *Davis*, 270 N.C.1, 153 S.E.2d 749, 757, *cert. denied*, 389 U.S. 828 (1967); *Scott* v. *State*, 216 Tenn. 375, 392 S.W.2d 681, 685-87 (1965); *Presby* v. *Klickitat County*, 5 Wash. 329, 31 P. 876, 877 (1892).

[94] *Miller* v. *Pleasure*, 296 F.2d 283, 284 (2d Cir. 1961), *cert. denied*, 370 U.S. 963 (1962); *Dolan* v. *United States*, 351 F.2d 671 (5th Cir. 1965); *United States* v. *Dillon*, *supra* note 93. See also *United States* v. *Thompson*, 356 F.2d 216, 227 n.12 (2d Cir.), *cert. denied*, 384 U.S. 964 (1965). See also the numerous cases collected in Annot., 21 A.L.R.3d 819, 822-29 (1968).

[95] See *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 224 (1957); *W. B. Worthen Co.* v. *Thomas*, 292 U.S. 426, 431-32 (1934); *Freeland* v. *Williams*, 131 U.S. 405, 413-20 (1889).

[96] *Graham* v. *Goodcell*, 282 U.S. 409, 426 (1931) (cause of action for an amount due); *Forbes Pioneer Boat Line* v. *Everglades Drainage Dist.*, 258 U.S. 338, 339 (1922) (cause of action for tolls unlawfully collected); *Angle* v. *Chicago, St. M. & O. Ry.*, 151 U.S. 1, 25-26 (1894) (cause of action for damages). See also *Gibbs* v. *Zimmerman*, 290 U.S. 326, 332 (1933).

that precept cannot benefit counsel here. Section 211(a) left unimpaired any litigable claim of counsel against their clients,[97] and in any event the federal treasury is not available as a source for satisfaction of the claim.

We conclude that the fact that adjudication of claims for noncontractual benefits is confided to the Administrator of Veterans' Affairs does not alone afford ground for constitutional complaint. Courts before which the constitutionality of predecessor provisions or counterparts of new Section 211(a) has been questioned have uniformly upheld those provisions.[98] The array of decisions doing so prominently includes several of our own,[99] and we are not disposed to discard them even if we were free to do so.[100]

The constitutional adjudications find common ground in the thesis, as expressed by the First Circuit, that "veterans' benefits are gratuities and establish no vested rights in the recipients so that they may be withdrawn by Con-

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[97] We intimate no view as to the situation of counsel and their clients *inter se.*

[98] *Milliken* v. *Gleason,* 332 F.2d 122, 123 (1st Cir. 1964), *cert. denied,* 379 U.S. 1002 (1965); *Smith* v. *United States,* 83 F.2d 631, 639 (8th Cir. 1936); *United States* v. *Robinson,* 103 F.2d 713, 715 (9th Cir. 1939); *United States* v. *Daubendiek,* 25 F.R.D. 50, 54 (N.D. Iowa 1959); *Steinmasel* v. *United States,* 202 F.Supp. 335, 337 (D.S.D. 1962). See also the cases cited *infra* note 99. See also *Strong* v. *United States,* 155 F.Supp. 468 (D.Mass. 1957), *appeal dismissed,* 356 U.S. 226 (1958).

[99] *Hahn* v. *Gray, supra* note 20, 92 U.S.App.D.C. at 190, 203 F.2d at 626; *Slocumb* v. *Gray, supra* note 16, 86 U.S.App.D.C. at 8, 179 F.2d at 34; *Van Horne* v. *Hines, supra* note 20, 74 App.D.C. at 216, 122 F.2d at 209; *Barnett* v. *Hines, supra* note 16, 70 App.D.C. at 220, 105 F.2d at 99.

[100] See, *e.g., Insurance Agents' Int'l* v. *NLRB,* 104 U.S.App.D.C. 218, 260 F.2d 736 (1958), *aff'd,* 361 U.S. 477 (1960); *Davis* v. *Peerless Ins. Co.,* 103 U.S.App.D.C. 125, 127, 255 F.2d 534, 536 (1958).

gress at any time and under such conditions as Congress may impose." [101] That proposition had its origin in a line of Supreme Court decisions,[102] and despite possible indication that that thesis may be waning,[103] we are obliged to accept it unless and until it is disapproved. We think, too, that there is another predicate possessing at least an equal measure of vitality. The Supreme Court has declared that "the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy

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[101] *Milliken* v. *Gleason, supra* note 98, 332 F.2d at 123. See also *Hahn* v. *Gray, supra* note 20, 92 U.S.App.D.C. at 190, 203 F.2d at 626; *Slocumb* v. *Gray, supra* note 16, 86 U.S.App.D.C. at 8, 179 F.2d at 34; *Van Horne* v. *Hines, supra* note 20, 74 App.D.C. at 216, 122 F.2d at 209; *Barnett* v. *Hines, supra* note 16, 70 App.D.C. at 220, 105 F.2d at 99; *Smith* v. *United States, supra* note 98, 83 F.2d at 639; *United States* v. *Robinson, supra* note 98, 103 F.2d at 715; *United States* v. *Daudendiek, supra* note 98, 25 F.R.D. at 54; *Steinmasel* v. *United States, supra* note 98, 202 F.Supp. at 337.

[102] The leader in this decisional line is *Lynch* v. *United States*, 292 U.S. 571 (1934), where the Court distinguished between pension-type benefits and rights under War Risk Insurance:

> War Risk Insurance, while resembling in benevolent purpose pensions, compensation allowances, hospital and other privileges accorded to former members of the army and navy or their dependents, differs from them fundamentally in legal incidence. Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. . . . On the other hand War Risk policies, being contracts, are property and create vested rights. The terms of these contracts are to be found in part in the policy, in part in the statutes under which they are issued and the regulations promulgated thereunder.

Id. at 576-77 (citations omitted). The characterization of pension-type benefits as gratuities drew upon earlier decisions to the same effect. *United States* v. *Cook*, 257 U.S. 523, 527 (1922); *Frisbie* v. *United States*, 157 U.S. 160, 166 (1895); *United States* v. *Teller*, 107 U.S. 64, 68 (1883).

[103] See *Goldberg* v. *Kelly, supra* note 85, 397 U.S. at 261-64.

through the courts;"[104] "it may," instead, "provide an administrative remedy and make it exclusive. . . ."[105] That is precisely what Congress did in the current version of Section 211(a), and Congress was well within its legislative prerogatives when it did so.

In summary, we hold that amended Section 211(a), properly construed, outlaws pending as well as future judicial reviews of the Administrator's determinations on claims for noncontractual benefits; that the District Court's awards of fees to counsel, as non-final judgments, are intercepted by the amendment to the same extent that the underlying awards of benefits would have been; and that Congress was constitutionally free to legislate these consequences. Our consequent lack of jurisdiction renders both unnecessary and improper any consideration of other objections appellants advance against allowance of the fees.

The fee awards appealed from are vacated and the appeals are dismissed for lack of jurisdiction.

So ordered.

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[104] *United States* v. *Babcock*, 250 U.S. 328, 331 (1919) (servicemen's claims for property damage occasioned in military service). See also *Dismuke* v. *United States*, 297 U.S. 167, 171-72 (1936) (claim under Civil Service Retirement Act); *Butte, A. & P. Ry.* v. *United States*, 290 U.S. 127, 142-43 (1933) (claim for reimbursement); *Work* v. *Rives*, 267 U.S. 175, 181-82 (1925) (claim for reimbursement); *Milliken* v. *Gleason*, *supra* note 98, 332 F.2d at 123 (claim for veterans' benefits). And see *Stark* v. *Wickard*, 321 U.S. 288, 306 (1944); *Tutun* v. *United States*, 270 U.S. 568, 576-77 (1926); *Reaves* v. *Ainsworth*, 219 U.S. 296, 306 (1911).

[105] *Dismuke* v. *United States*, *supra* note 104, 297 U.S. at 172. See also *Tutun* v. *United States*, *supra* note 104, 270 U.S. at 576; *Milliken* v. *Gleason*, *supra* note 98, 332 F.2d at 123.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA.

Civ. A. No. 635-65.

PATROCINIA L. VDA RODULFO, *Plaintiff*,

v.

UNITED STATES OF AMERICA and ADMINISTRATOR OF VETERANS AFFAIRS, *Defendants*.

October 29, 1968

[2] **Opinion of Judge Holtzoff**

The Court: This is an action against the United States and against the Administrator of Veterans Affairs to recover certain benefits granted to Veterans. The action is brought by the widow of a Filipino Scout who died in a Japanese Prisoner of War Camp during World War II.

There are two aspects to this claim. One is the claim for compensation for death benefits. Such compensation had been previously allowed by the Veterans Administration and was subsequently discontinued and forfeited for fraud.

The plaintiff seeks a restoration of this death compensation. The pertinent statute attaches finality and conclusiveness to the decisions of the Veterans Administration concerning a claim for benefits or payments under any law administered by the Veterans Administration. The same statute presently denies Court review in such matters. 38 U.S. Code 211 (a). Until recently this statute had been uniformly applied both administratively and judicially to all decisions of the Veterans Administration relating to benefits, death benefits or compensation for death.

In 1965, however, in the case of Tracy vs. Gleason, [3] 126 Appeals D. C., 419, (sic) the Court of Appeals in an exhaustive, well considered opinion, held that finality

applies only to a claim in a particular form prescribed for use by a veteran in applying for benefits, and does not include the Administrator's subsequent discontinuance of benefits theretofore awarded.

Consequently, discontinuance of benefits previously awarded is now subject to judicial review. In this case, death compensation was discontinued and forfeited because the widow filed an affidavit to the effect that her daughter was alive, but at the time the affidavit was made the daughter had already died.

The forfeiture for fraud against the government is authorized by 38 U.S. Code, 715. It is significant that the statute does not state whether the government agency may administratively administer the forfeiture or whether it is to be administered in a judicial proceeding. It is not necessary for the purpose of deciding this case, to determine this question, because if the forfeiture may be administered administratively, it is subject to judicial review under Tracy vs. Gleason.

The difference between the Veterans Administration and the plaintiff involved so much of the death compensation as was allocated to her daughter who was deceased at the time [4] this affidavit was filed. The plaintiff refunded the excess payments subsequently. Nevertheless, the government caused a criminal prosecution to be instituted against the plaintiff which it later caused to be dismissed. In connection with the dismissal, the government formally and on the record, absolved the plaintiff from any implication of fraud.

In view of this circumstance, the Court is of the opinion that the forfeiture should be set aside. And accordingly, the Court will render a judgment in the nature of mandamus against the Administrator of Veterans Affairs, requiring him to restore the death compensation payable to

the plaintiff, and making it retroactive from the date on which it was discontinued.

A more difficult problem is presented by the second aspect of the case, namely, the claim for benefits under automatic life insurance. Under the pertinent statute, a widow's benefits, under that provision, are terminated if she remarries. On that basis the Veterans Administration discontinued her death compensation as of April 12, 1957. The grounds for discontinuance was that the plaintiff had maintained an illicit relationship with a man subsequent to her husband's death.

It has been held by this Court and by the Court [5] of Appeals, contrary to the view of the Veterans Administration, that common-law marriages are not recognized in the Philippines and that, consequently, the fact that the widow maintained an illicit relationship with another man can not constitute a remarriage unless a ceremonial marriage is proven.

The Veterans Administration has been adamant in refusing to follow decisions of the Court on that point. This Court ordinarily does not criticize executive agencies, but in this instance of extreme disregard of judicial decisions, criticism of a severe kind may well be leveled at the Veterans Administration. The Veterans Administration has changed its attitude in order to get away from these decisions and holds that there is a presumption of a marriage from the fact that a man and a woman are living together as man and wife. And there is no warrant, and no basis for such an attitude.

It is clear to the Court that this plaintiff has received shabby treatment from the Veterans Administration. There is a difficulty, however. The government relies on the six-year statute of limitations. The cause of action arose on April 12, 1957 when payments were discontinued. The complaint in this action was first received in the office of

the clerk of this Court on July 13, 1964, more than six years [6] after the cause of action arose.

On its face, the action would be barred by the statute of limitations. In order to avoid this, counsel for the plaintiff ingeniously relies on the following facts: On May 29, 1958 a criminal information was filed against the plaintiff in an appropriate Philippine court, charging her with fraud in taking a false affidavit. This information was dismissed on a motion of the government with a statement absolving her from any intimation of actual fraud, on August 16, 1960. Plaintiff counsel seeks to deduct this interval from the period of limitation.

The Court has a great deal of sympathy with the plaintiff's position and with this argument. The Court, however, knows of no law which provides that the pendency of a criminal proceeding would suspend the running of the statute of limitations.

The Court realizes that the Veterans Administration was guilty of wrong and injustice in suspending the payments of insurance, in the first instance. Nevertheless, the Court sees no escape from the period of the statute of limitations. Because it fines (sic) no basis for deducting the period of pendency of the criminal proceeding.

[7] Under the circumstances, the Court will dismiss the claim for benefits under the National Life Insurance policy, solely on the grounds of the statute of limitations. And I might say that the Court does so reluctantly.

The Court will allow an appeal in forma pauperis if it is desired to present one. Counsel will submit a proposed judgment granting relief against the Administrator, in respect to the compensation for death, and counsel for the United States will submit a proposed judgment dismissing the cause of action against the United States for benefits under the National Life Insurance Act, solely on the ground of the statute of limitations.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA.

Civ. A. No. 635-65.

PATROCINIA L. VDA RODULFA, *Plaintiff*,

v.

UNITED STATES OF AMERICA and ADMINISTRATOR OF VETERANS AFFAIRS, *Defendants*.

Jan. 9, 1969.

Opinion

HOLTZOFF, District Judge.

The Court has before it an application or a motion on the part of plaintiff's counsel for an amendment of the judgment in this action to provide for an allowance of counsel fees. The action was brought against the United States for benefits under the National Service Life Insurance Act and for compensation for the death of a veteran.

Only the second aspect of the claim is before the Court at this time, as the first aspect was dismissed. By a recent provision of law, a person recovering damages against the Government is entitled to recover costs. This was not the fact previously. Unfortunately, however, under our system of law, unlike the English system, taxable costs do not include attorney's fees or counsel fees, so that taxable costs never make the successful party whole. In fact, under our system of law, a person who is successful in the litigation is a part loser because he has to pay his own expenses and counsel fees, except a few minor items that are taxable as costs.

In England taxable costs include attorney's and counsel fees, and the successful litigant is made whole. In the United States, the Court in its discretion, in appropriate

cases, may allow counsel fees for the successful plaintiff out of the recovery, on the theory that the successful efforts of counsel have created a fund, and that counsel fees and attorney's fees should be paid out of the fund.

The Court knows of no valid reason why this could not be done in instances such as this. For example, this is expressly permitted under the Federal Tort Claims Act, 28 U.S. Code § 2678, which authorizes the Court to award counsel fees not exceeding a specified percentage out of any recovery under that statute. The maximum permitted under the statute in its present form is 25 percent of the recovery. The laws relating to veterans contain very strict limitations on counsel fees for prosecuting claims before the Veterans Administration. These prohibitions are salutary and desirable because there is no reason why any counsel should be employed to prosecute any claim for benefits before the Veterans Administration and ordinarily no counsel are employed. Obviously, the purpose of the limitation is to prevent unscrupulous lawyers from soliciting claims of that kind.

Here, however, we have a lawsuit. The situation in actions for veterans' benefits, after they have been administratively denied, is entirely different. Such actions cannot be instituted or maintained without the services of a lawyer, and no reason is discernible why the Court should not allow counsel fees out of the recovery if the action results in a judgment in favor of the veteran whom counsel represents. We must realize that unless we permit counsel fees, many veterans will be unable to secure counsel to bring such actions, because obviously there is no reason why counsel should work gratuitiously. The Courts have it in their power in providing for fees to prevent any extravagant allowances or improvident grants.

[1] Counsel for the Government, quite properly, in protecting not only the Government, but also the veterans, calls attention of the Court to 38 U.S. Code § 3405, which

prohibits certain fees or compensation. Section 3405, however, is a part of the legislation relationg to benefits to veterans. The purpose of Section 3405 is to prevent unscrupulous persons from receiving compensation or fees for obtaining benefits for veterans from the Veterans Administration. Again, I repeat, this is a very salutary provision. It does not, however, apply to counsel fees in litigation.

[2] The Court is of the opinion that it has power to award counsel fees in an action brought by a veteran or beneficiary of a veteran, for benefits under the various laws relating to veterans, and to provide that such counsel fees shall be paid out of the recovery. Naturally this power should be exercised conservatively and with due regard to the interests, not only of counsel, but principally of the veteran. There should be no undue dissipation of the veteran's benefits for counsel fees. The Courts can be trusted to perform this function.

[3] The Court further deems that this is a proper case for the exercise of the power. Under the Federal Tort Claims Act, the Court may allow as much as 25 percent of the recovery, but no more. The Court is going to use the analogy of the Federal Tort Claims Act and allow a fee of 25 percent of the recovery.

The Court may add that many of these counsel fees may be eliminated if the Veterans Administration retreated from its intransigent attitude of litigating case after case, even on points which have been decided against the Government in other cases, either by this Court or the Court of Appeals.

The Court will grant the motion and allow a fee of 25 percent of the recovery as counsel fees.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA.

Civ. A. No. 3136-67.

JULIANA CAPARAS VDA DEL ROSARIO, *Plaintiff*,

v.

UNITED STATES OF AMERICA and ADMINISTRATOR OF VETERANS' AFFAIRS, *Defendants*.

Order and Judgment

(In the Nature of a Writ of Mandamus)

This cause having come on before the Court on October 30, 1968 for oral hearing on Defendants' Motion to Dismiss or in the alternative, for Summary Judgment, and on Plaintiff's Motion for Summary Judgment, and upon consideration of the Motions, the Pleadings, the Defendants' undisputed Statement of Material Facts as to which there is no genuine issue, the Points and Authorities in behalf of each motion, the supporting exhibits, the Points and Authorities in opposition to each motion, and the oral argument of counsel, it is by the Court this 28th day of January, 1969.

ORDERED, ADJUDGED AND DECREED:

1. That Defendants' Motion for Summary Judgment be and the same is hereby granted with respect only to Plaintiff's claim for National Service Life Insurance, and

2. That Defendants' Motion to Dismiss, or in the Alternative for Summary Judgment be and the same is hereby denied with respect to Plaintiff's claim for payment of compensation benefits.

3. That Plaintiff's Motion for Summary Judgment be and the same is hereby denied with respect to Plaintiff's claim for National Service Life Insurance, and

4. That Plaintiff's Motion for Summary Judgment against Defendant, William J. Driver, Administrator of

Veterans Affairs, be and the same is hereby granted, and pursuant thereto.

5. That the said William J. Driver, Administrator of Veterans Affairs, be, and he and his successor and successors in office are, ordered and commanded by the Court to render an account forthwith to Plaintiff, and her counsel, for the correct award of compensation due Plaintiff for the death of the deceased serviceman, Nicanor Del Rosario, from the date of his death to the date of said account, and

6. That said Defendant and his successor and successors in office shall thereupon and thereafter forthwith pay to the Plaintiff, except as hereinafter set forth:

a. All said compensation due Plaintiff pursuant to the proceedings before the Court from the date of death of the serviceman, Nicanor Del Rosario, to date of payment and thereafter.

b. All sums of compensation hitherto unlawfully and incorrectly withheld by said Defendant by the procedure of off-setting "so-called" over-payments of compensation against payments of National Service Life Insurance due the Plaintiff.

c. Subject always to credit to said Defendant for compensation paid to Plaintiff on account of her deceased child, Lucila, for whom no payments should have been paid or payable, and subject further to credit to said defendant for any adjustment necessary to correct the prior award and awards to reflect any variation in entitlement of Plaintiff's three living children by reason of any payments made for the deceased Lucila, there being no intention by either party for any duplication of payment, and

d. That said Defendant and his successor and successors in office be and are hereby ordered and commanded by the Court to forthwith commence and continue monthly payments of compensation to Plaintiff within thirty days of this order, in accordance with the applicable statutes pertaining to her continued entitlement thereto, and

e. That of all sums due and payable to Plaintiff pursuant hereto the said Defendant and his successor and successors in office shall withhold the sum of 20% as reasonable attorney's fees in this proceeding and that said sum and sums so withheld for attorney's fees shall be paid to Harold J. Nussbaum, 1420 K Street, N.W., Washington, D.C. 20005, counsel for the Plaintiff by appointment of this Court. See *Rodulfa* v. *U.S.*, — F.Supp. — (D.C.D.C. No. 635-65, 1968).

/s/ H. F. Corcoran
Judge

[Matter Following Judge's Signature Omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,947

Mrs. Patrocinia L. Vda de Rodulfa,

v.

United States of America,

and

Administrator of Veterans' Affairs, *Appellant.*

No. 23,000

Juliana Caparas Vda del Rosario,

v.

United States of America and William J. Driver,
Administrator of Veterans Affairs, *Appellants.*

On Appeal from the United States District Court for the District of Columbia

Appellants' Corrected Tables A, B, and C

Our supplemental brief, filed herein on October 2, 1970, included Tables A, B, and C as an addendum. Those original tables listed and analyzed "a present total of 126 judg-

ments requiring payment of compensation benefits by the Government" (Supp. Br. 8).

We have since identified six more judgments of this kind. Since other minor changes are also indicated, we now present those tables to the Court in corrected form.

The corrections affect the information summarized under Point 3 of our supplemental brief (pp. 8-9) as follows:

(a) The district court has rendered a total of 132 judgments requiring payment of compensation benefits by the Government (Supp. Br. total was 126).

(b) Estimated eventual total liability under existing judgments is $3,463,649.30 (Supp. Br. total was $3,516,-781.10). This represents combined final totals from Corrected Tables A, B, and C, *infra*.

(c) If the flat 25% fees set below were allowed to stand, some $855,541.82 thereof would be diverted from the widows to their attorneys (Supp. Br. diversion was $868,387.64). This represents combined fee totals from Corrected Tables A, B, and C, *infra*.

Respectfully submitted,

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NOVEMBER 1970.

CORRECTED TABLE A

Amounts Already Paid Under 78 Judgments, With Estimated Total Future Payments *

Plaintiff	C.A. No.	Payments to Plaintiff		Counsel Fees	
		Lump Sum	Future (Est.)	Lump Sum	Future (Est.)
				Mr. Lerch	
Abolino	1889-68	$ 2,074.50	$ (none)	$ 691.50	$ (none)
Abrio (1st)	2674-68	85.00	(none)	28.33	(none)
Aguinaldo	1155-68	16,305.64	20,751.00	5,435.21	6,917.00
Alcayro (1st)	741-69	2,857.75	(none)	952.58	(none)
Almayda	1184-68	11,614.50	42,760.50	3,871.50	14,253.50
Apostol (1st)	2494-69	2,472.90	(none)	824.30	(none)

46a

* Our prior supplemental memorandum analyzed a group of judgment cases to show accrued benefits and estimated future payments, based upon actual benefits, actual ages, and life expectancy. The Veterans Administration, which is unable at this time to furnish similar exact information for all 126 of the outstanding judgments, suggests that averages based upon the previous figures will be reasonably accurate.

Thus, average accrued benefits paid to those widows was $10,809.80; additional amounts reserved for counsel fees averaged $3,571.90. Estmated future benefits averaged $30,037.71, plus $9,752.52 for fees. The latter two figures take into account an approximately 20% increase in benefits recently allowed under P.L. 91-96. 83 Stat. 144 (see our prior supp, mem., p. 2). Estimated average amounts are shown in parentheses.

Apostol (2nd)	"	3,562.89	(30,037.71)	1,187.63	(9,752.52)
Arancana	2279-68	10,707.00	29,999.00	3,569.00	9,999.75
Binayug	1246-68	8,689.67	10,256.25	2,896.56	3,418.75
Cadiz	3183-68	9,369.11	48,013.50	3,123.03	16,004.50
Capin	1746-68	2,477.45	(30,037.71)	825.82	(9,752.52)
Catura	2673-68	12,334.76	41,728.50	4,111.58	13,909.50
Delmendo	2021-68	17,961.75	31,689.00	5,987.25	10,563.00
Dimayuga	1197-68	14,732.40	28,713.00	4,910.80	9,571.00
Fernandez	2102-68	2,598.28	(none)	866.09	(none)
Francisco	2123-68	4,382.05	13,913.66	1,933.59	4,637.15
Gabrieles (1st)	1968-68	12,461.15	(none)	3,487.05	(none)
Gabrieles (2nd)	"	9,558.00	(30,037.71)	3,186.00	(9,752.52
Galising	2177-68	3,217.37	19,614.65	1,072.46	6,540.24
Jagolino	2559-68	18,002.81	39,253.50	6,000.93	13,084.50
Jimenez	1954-68	16,385.43	32,616.00	5,461.80	10,872.00
Josim	1393-68	12,113.25	24,363.00	4,037.75	8,121.00
Lumio	2241-68	16,082.16	(30,037.71)	5,360.73	(9,752.52)

Plaintiff	C.A. No.	Payments to Plaintiff		Counsel Fees	
		Lump Sum	Future (Est.)	Lump Sum	Future (Est.)
Macauyag	2331-68	$12,978.20	$49,843.50	$ 4,326.08	$16,614.50
Pasaporte	1745-68	12,272.25	(none)	4,090.75	(none)
Pascua	2091-68	3,707.05	20,226.16	1,235.69	6,740.98
Ponce (1st)	1140-69	3,134.25	(none)	1,044.75	(none)
Regal	1699-68	11,628.00	(none)	3,876.00	(none)
Rico (1st)	2495-68	4,143.55	(none)	1,381.18	(none)
Roa	1925-68	8,051.50	(30,037.71)	2,683.84	(9,752.52)
Rodulfa	635-65	17,405.38	39,186.00	5,801.79	13,062.00
Sarabia	1927-68	2,075.75	(30,037.71)	691.92	(9,752.52)
Tavita (1st)	2491-68	2,285.82	(none)	761.94	(none)
Ysagan (1st)	2240-68	1,855.35	(none)	618.45	(none)
(Lerch Sub-Total)		$293,956.96	$694,003.22	$ 97,791.89	$229,774.23

				Mr. Nussbaum	
Agasino (1st)	2152-69	$ 405.48	$ (none)	$ 135.16	$ (none)
Agasino (2nd)	"	3,491.67	(30,037.71)	1,163.89	(9,752.52)
Agdeppa (1st)	2153-69	1,755.24	(none)	585.08	(none)
Agdeppa (2nd)	"	3,724.26	(30,037.71)	1,241.16	(9,752.52)
Aguilar (1st)	2526.69	3,766.05	(none)	1,255.35	(none)
Aguilar (2nd)	"	9,878.85	(30,037.71)	3,292.95	(9,752.52)
Agustin	2857-67	3,782.05	19,052.50	1,260.68	6,349.80
Alipante (1st)	946-69	10,412.10	(none)	3,470.70	(none)
Alipante (2nd)	"	9,840.00	(30,037.71)	3,279.80	(9,752.52)
Bacierto (1st)	2055-69	6,334.65	(none)	2,111.55	(none)
Bacierto (2nd)	"	9,844.20	(30,037.71)	3,281.40	(9,752.52)
Bagsit	2049-69	827.64	(none)	275.99	(none)

Plaintiff	C.A. No.	Payments to Plaintiff		Counsel Fees	
		Lump Sum	Future (Est.)	Lump Sum	Future (Est.)
Basanes	1159-68	$24,563.26	$39,253.50	$ 8,187.74	$13,084.50
Bergonia	2796-67	13,283.88	31,212.75	4,427.96	10,404.25
Bringas	231-69	3,013.85	21,345.53	1,004.61	7,114.60
Cabe (1st)	1777-69	1,063.63	(none)	354.54	(none)
Canas (1st)	1774-69	1,336.90	(none)	445.63	(none)
Canas (2nd)	"	4,015.26	(30,037.71)	1,338.42	(9,752.52)
Celetaria (1st)	1608-69	1,468.89	(none)	489.63	(none)
Celetaria (2nd)	"	3,670.35	(30,037.71)	1,223.45	(9,752.52)
Cerezo	2285-69	3,613.47	(30,037.71)	1,204.49	(9,752.52)
Comia	2960-69	2,241.21	(none)	747.07	(none)
Daquiwag (1st)	2151-69	6,990.58	(none)	2,330.19	(none)
Daquiwag (2nd)	2151-69	9,026.10	(30,037.71)	3,008.70	(9,752.52)

Garcia	1647-69	727.53	(none)	242.51	(none)
Guilleron	1158-68	19,931.22	30,392.25	6,643.74	10,130.75
Keaton	1191-68	6,613.24	(none)	2,204.42	(none)
Manansala	2080-68	4,783.58	(30,037.71)	1,594.53	(9,752.52)
Molina	1607-69	1,471.47	(none)	490.49	(none)
Samera (1st)	2552-69	1,343.05	(none)	447.68	(none)
Trilles (1st)	2150-69	729.69	(none)	243.23	(none)
Umali	1778-69	1,578.81	(none)	526.27	(none)
Villanueva (1st)	1642-69	952.54	(none)	317.51	(none)
Villanueva (2nd)	"	3,423.38	(30,037.71)	1,142.57	(9,752.52)
Villarin	987-69	21,494.25	20,995.50	7,164.75	6,998.50
Viscocho	2155-69	342.00	(none)	114.00	(none)
Yawton (1st)	1292-69	1,535.68	(none)	511.90	(none)
Yawton (2nd)	"	3,423.38	(30,037.71)	1,142.57	(9,752.52)
(Mr. Nussbaum Sub-Total)		$224,067.75	$557,580.55	$ 73,244.29	$179,831.64

Plaintiff	C.A. No.	Payments to Plaintiff		Counsel Fees	
		Lump Sum	Future (Est.)	Lump Sum	Future (Est.)
				Mr. Kallis	
Delfin	2672-68	539.55	(none)	179.85	(none)
				Miss Murray	
Castro (1st)	1888-69	8,559.30	(none)	2,853.10	(none)
Castro (2nd)	"	10,370.70	(30,037.71)	3,456.90	(9,752.52)
(Murray Sub-Total)		$ 18,930.00	$ 30,037.71	$ 6,310.00	$ 9,752.52
				Mr. Kennelly	
Avendano	2575-69	5,043.69	(30,037.71)	1,681.23	(9,752.52)

GRAND TOTALS (Table A):

Payments to Plaintiff		Counsel Fees	
Lump Sum	Future (Est.)	Lump Sum	Future (Est.)
$542,537.95	$1,311,659.19	$179,207.26	$429,110.91
$1,854,197.14		$608,318.17	
$2,462,515.31			

CORRECTED TABLE B

Unpaid Judgments (14) Requiring Running Future Awards *

Plaintiff	C.A. No.	Required Payments to Plaintiff (Average)		Counsel Fees (Average)	
		Accrued	Future	Accrued	Future
				Mr. Lerch	
Abrio (2nd)	2674-68	$(9,014.32)	$(30,037.71)	$(2,973.41)	$(9,752.52)
Alcayro (2nd)	741-69	(9,014.32)	(30,037.71)	(2,973.41)	(9,752.52)
Ponce (2nd)	1140-69	(9,014.32)	(30,037.71)	(2,973.41)	(9,752.52)
Rico (2nd)	2495-68	(9,014.32)	(30,037.71)	(2,973.41)	(9,752.52)
Tavita (2nd)	2491-68	(9,014.32)	(30,037.71)	(2,973.41)	(9,752.52)
Ysagan (2nd)	2240-68	(9,014.32)	(30,037.71)	(2,973.41)	(9,752.52)
(Lerch Sub-Total)		$(54,085.92)	$(180,226.26)	$(17,840.46)	$(58,515.12)

Cabe (2nd)	1777-69	(9,014.32)	(30,037.71)	(2,973.41)	(9,752.52)
Catalan	2933-69	(10,809.80)	(30,037.71)	(3,571.90)	(9,752.52)
Dela Jara	2983-69	(10,809.80)	(30,037.71)	(3,571.90)	(9,752.52)
Samera (2nd)	2552-69	(9,014.32)	(30,037.71)	(2,973.41)	(9,752.52)
Sevilla (2nd)	2154-69	(9,014.32)	(30,037.71)	(2,973.41)	(9,752.52)
Trilles (2nd)	2150-69	(9,014.32)	(30,037.71)	(2,973.41)	(9,752.52)
(Nussbaum Sub-Total)		$(57,676.88)	$(180,226.26)	$(19,037.44)	$(58,515.12)
				Mr. Bergman	
Grospe	2912-68	(10,809.80)	(30,037.71)	(3,571.90)	(9,752.52)
Merina	718-69	(10,809.80)	(30,037.71)	(3,571.90)	(9,752.52)
(Bergman Sub-Total)		$(21,619.60)	$(60,075.42)	$(7,143.80)	$(19,505.04)
Grand Totals:		$(133,382.40)	$(420,527.94)	$(44,021.70)	$(136,535.28)
		$(553,910.34)		$(180,556.98)	
		$(734,467.32)			

* No payments have been made as yet under these 14 judgmenst. Amounts due have accordingly been estimated (see footnote to Table A, *supra*, for basis). Each judgment included in Table B requires both a lump sum accrued payment and subsequent monthly installments for life.

CORRECTED TABLE C

UNPAID JUDGMENTS (40) WITHOUT RUNNING FUTURE AWARDS *

Mr. Nussbaum (counsel)

Abrigo, C.A. No. 1481-69

Bandolin, C.A. No. 1649-69

Blanca, C.A. No. 1643-69

Blando, C.A. No. 2547-69

Cabanos, C.A. No. 1482-69

Cailao, C.A. No. 1483-69

Castriciones, C.A. No. 1653-69

Cuaresma, C.A. No. 1484-69

Daylo, C.A. No. 1604-69

Doroja, C.A. No. 1293-69

Esque, C.A. No. 621-69

Fayloga, C.A. No. 1776-69

Gilizon, C.A. No. 2545-69

Mico, C.A. No. 938-69

Mola, C.A. No. 1636-69

Naoa, C.A. No. 1156-68

Obrero, C.A. No. 2553-69

Pareno, C.A. No. 2284-69

Pascua, C.A. No. 2530-69
(1st) (plaintiff died before payment)

Pascua, C.A. No. 2530-69
(2nd) (plaintiff died before payment)

Paulino, C.A. No. 2539-69

* Since these 40 unpaid judgments for the most part involve pre-1962 benefits, the Veterans Administration estimates that $266,666.67 will be due thereunder ($200,000 to the claimants and $66,666.67 to their counsel). This is arrived at by multiplying 40 (judgments) times $5,000 (which is approximately one-half of the $10,809.80 average described in the footnote to Corrected Table A, *supra*), plus one-third thereof (comparable to 25% of the $266,666.67 total) for counsel.

Peramo, C.A. No. 2054-69

Perez, C.A. No. 1637-69

Respicio, C.A. No. 2961-69

Sevilla, C.A. No. 2154-69
(1st)

Tander, C.A. No. 131-70

Torda, C.A. No. 1157-68

Zotomayor, C.A. No. 1641-69

Miss Murray (counsel)

Anicete, C.A. No. 1219-70

Cambronero, C.A. No. 1446-70

Ramos, C.A. No. 579-70

Mr. Kennelly (counsel)

Caasi, C.A. No. 1723-69

Mr. Lerch (counsel)

Dampitan, C.A. No. 2023-68

Fresco, C.A. No. 1450-69

Gacad, C.A. No. 3485-69

Mr. Samorajcyk (counsel)

Monton, C.A. No. 1897-69

Mr. Bergman (counsel)

Quibael, C.A. No. 2932-68

Mr. Greenbaum (counsel)

Ramos, C.A. No. 1898-69

Mr. Olender (counsel)

Coloma, C.A. No. 1726-69

Oringo, C.A. No. 1727-69

• • •

Supplement To Corrected Tables A, B, and C

On November 9, 1970, we lodged 25 copies of our Corrected Tables A, B, and C, listing and analyzing 132 judgments which require payment of compensation benefits.

Two more judgments of this kind have since been identified. The following changes in the Corrected Tables seem indicated:

(a) An additional judgment, identified as "Dampitan (2nd), C.A. No. 2023-68", should be included in Mr. Lerch's portion of Corrected Table B. Eventual total liability under this judgment is $51,777.96, of which $12,725.93 is presently attributable to counsel fees.

(b) Another judgment, identified as "Escamilla, C.A. No. 838-70", with Mr. Kennelly as counsel, should be added at the end of Corrected Table B. Eventual total liability under this judgment is $54,171.93, of which $13,324.42 is presently attributable to counsel fees.

(c) A "Dampitan" judgment already appears on Corrected Table C (Mr. Lerch, counsel): this should be further identified as "Dampitan (1st), C.A. No. 2023-68".

(d) The district court has rendered a total of 134 judgments which require payment of compensation benefits by the Government (the Corrected Tables list and analyze 132 such).

(e) Estimated eventual total liability under these 134 existing judgments is $3,569,599.19 (the Corrected Tables, based upon 132 judgments, show this as $3,463,649.30).

(f) If the flat 25% fees set below were allowed to stand, some $881,592.17 thereof would be diverted from the widows

to their attorneys (the Corrected Tables show this as $855,541.82).

Respectfully submitted,

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

ALAN S. ROSENTHAL,
DAVID V. SEAMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530

Attorneys for Appellants.

NOVEMBER 1970.

JUNE 9, 1970.

HON. OLIN E. TEAGUE
Chairman, Committee on Veterans' Affairs,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for a report by the Veterans' Administration on H.R. 17564, 91st Congress.

The bill proposes to amend 38 U.S.C. 101 to define the term "claim" "for the purpose of any law administered by the Veterans' Administration" to include an application for benefits or payments under any such law; the assertion of rights to continuance, nonreduction, or restoration of such benefits or payments; and the assertion of rights to such benefits or payments which have been found to be forfeited under 38 U.S.C. 3503 or 3504 or prior corresponding provisions of law. The definition would be made effective as of October 17, 1940.

For many years prior to 1958, the Federal courts uniformly held that decisions of the officials responsible for the administration of laws providing benefits of a noncontractual nature to veterans and their dependents and survivors were not subject to judicial review. This position was based upon section 5 of Public No. 2, 73d Congress, March 20, 1933, and on section 11 of Public No. 866, 76th Congress, October 17, 1940. Provisions substantially identical to the latter are now set out in 38 U.S.C. 211(a) reading as follows:

"(a) Except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact concerning a *claim* for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision." [Emphasis supplied.]

(The mentioned exceptions of sections 775, 784, and chapter 37 of title 38, United States Code, relate to insurance and loan guaranty contract matters.)

In 1958 the U.S. Court of Appeals for the District of Columbia circuit overruled, in *Wellman* v. *Whittier, Administrator,* 259 F. 2d 163, a Veterans' Administration decision of forfeiture for assistance to an enemy in wartime. One of the judicial findings was an interpretation that the word "claim" in the 1940 predecessor to 38 U.S.C. 211(a) related only to an application for benefits, and that the finality provisions of the section therefore would not apply to a termination of monthly disability compensation payments once an award had been made on the application. In 1962, this appellate court cited the *Wellman* decision as precedent for remanding the same sort of case for district court action in *Thompson* v. *Gleason, Administrator,* 317 F. 2d 901. Both of these cases involved statutes providing specifically for forfeiture of *all* noncontractual benefits from the Veterans' Administration if the beneficiary committed certain acts.

Meanwhile, in a 1959 case not concerned with the forfeiture statute (*Sinlao* v. *United States and Whittier, Administrator,* 271 F. 2d 846), this same court referred to the *Wellman* decision and cited its earlier decisions upholding finality of Veterans' Administration acts, as precedential for its ruling that the terms of 38 U.S.C. 211(a) barred it from reviewing the termination of a Philippine widow's death compensation payments (because of a relationship held by the Veterans' Administration to be indicative of her remarriage). Having so found, the Court included dictum questioning the Veterans' Administration rule on remarriage and stating that the rule could not be reconciled with congressional intent. As discussed hereinafter, this criticism was brought to the attention of the Congress, with resulting committee reports confirming the Veterans' Administration rule and a statutory amendment imposing even more restrictive eligibility requirements after September 19, 1962.

In May 1967, this Court of Appeals again quoted and amplified the effect of, the *Wellman* rationale on "claims" in *Tracy* v. *Gleason, Administrator,* 379 F. 2d 469. This was a suit by heirs for a veteran's disability pension payments which had been discontinued due to his nonreturn of reports required for establishment of his continued payment eligibility. This termination was likened by the Court to the forfeiture in *Wellman* and *Thompson.* The Court then declared that its other decisions on finality, including *Sinlao,* were overruled insofar as they were in conflict with the *Wellman* decision. Restating the *Wellman* distinction between a decision on a "claim" (application for benefits) and an action initiated by the Administrator, the Court added:

"It may be that the Administrator's failure to recognize this plain distinction arises from the fact that apparently it is his routine practice to continue to designate a veteran's benefits file as a 'claim,' after the claim has been allowed and benefits have been awarded. Thus he reasons that when he terminates a veteran's benefits, he is making a decision as to a 'claim.' This use of the word 'claim' may be convenient to office procedure but it does not bring a termination of benefits within the meaning of the word 'claim' in section 211(a)."

It would have been more accurate to define the Veterans' Administration's position as considering an application for benefits to constitute a continuing claim for benefit payments; that is, that the applicant continues to allege his unchanging eligibility to receive such payments within requirements of the governing statutes and regulations. We believe that this administrative interpretation of the term "claim" is supported by legislative history, since the 1940 provision (now carried forward as 38 U.S.C. 211(a) had been proposed by the Veterans' Administration and was enacted for the specific purpose of completely exempting this agency from a then pending bill (which was ultimately

vetoed) designed to afford judicial review of all administrative acts and processes.

Although the Solicitor General of the United States, for various reasons, did not seek review by the Supreme Court of the United States of any of the three mentioned decisions, he assured the Veterans' Administration, in 1967 following the *Tracy* decision, that the Department of Justice would continue to assert that the courts lacked jurisdiction to review the decisions of the Administrator, whether these decisions be viewed as refusing or terminating benefits.

The *Wellman, Thompson,* and *Tracy* decisions have not been followed in any of the other 10 Federal judicial circuits throughout the country. Nevertheless, soon after the *Tracy* decision, suits in the nature of mandamus or for declaratory judgment commenced to be filed in the U.S. District Court for the District of Columbia in constantly increasing numbers by plaintiffs seeking resumption of terminated benefits. As of March 8, 1970, 353 suits of this type had been filed in the District of Columbia circuit.

A small portion of these concern such diverse matters as a 1930's termination of a widow's pension payments under a statute then extant, because of her open and notorious adulterous cohabitation; invalid marriage to a veteran; severance of a veteran's service connection for disability compensation, or reduction of such compensation because of lessened disability; and widows' conduct after September 19, 1962, barring them from death pension or compensation eligibility under the more restrictive criteria enacted from that date. Judgments in the District of Columbia on such matters, about 25 percent of those entered thus far, have upheld the administrative determinations.

The large majority, however, of the *Tracy*-based suits filed in the U.S. District Court for the District of Columbia were brought by Philippine widows of World War II servicemen for restoration of death compensation or pen-

sion benefits which were terminated after the Administrator raised a presumption of their remarriage on the basis of evidence adduced by field examinations. Resort to the presumption of remarriage rule was deemed necessary because experience had shown that many widows apparently successfully concealed the record of their ceremonial marriage in order to continue to receive benefits. With few exceptions, these termination decisions were in keeping with the longstanding administrative rule followed by the Veterans' Administration that there is an inference or presumption of a widow's remarriage, placing upon her the burden of proving her continued eligibility to receive the benefit payments when there is proof of each of the following:

(1) A cohabitation by the widow with a man as man and wife; and

(2) A "holding out" by the two persons to the general community in which they reside that they are husband and wife (which generally is embraced in the requisite cohabitation); and

(3) A general reputation in such community that they are married to each other.

The presumption of remarriage rule was not expressly authorized by statute, although some form of the rule has been in effect for over 100 years. In 1959, when the appellate court questioned the Veterans' Administration's rule on remarriage, in the *Sinlao* case, we urged the amendment of a then-pending bill to enact a statutory provision confirming our interpretation and our application of the presumption of remarriage rule.

As a result, the Congress, in Public Law 87-674, September 19, 1962, (1) amended the definition of the term "widow" to add the language—"or (in cases not involving remarriage) has not since the death of the veteran and after enactment of the 1962 amendment to this para-

graph, lived with another man and held herself out openly to the public to be the wife of such other man," and (2) endorsed our application, theretofore, of the presumption of remarriage rule. The mentioned endorsement is clearly explained in reports of your committee (H. Rept. No. 1459, 87th Cong.), and of the Senate Committee on Finance (S. Rept. No. 1842, 87th Cong.). Particularly illustrative is this excerpt from the Senate report:

"The bill also deals with an area in which there have been some abuses. In some cases, in order to avoid the 'remarriage' bar to payment of widow's benefits, women have entered into illicit relationships with men, holding themselves out to the public to be their wives, while drawing benefits as the widow of a veteran. The Veterans' Administration has adopted a rule under which it is presumed where certain facts exist that a remarriage has occurred; however, the validity of this practice has been questioned recently in the case *Sinlao* v. *United States* (271 F. 2d 846). The bill establishes a statutory test to be applied by the Administrator in such cases, providing for the termination of benefits where the widow of a veteran lives with another man and holds herself out to the public to be the wife of the other man. *Enactment of this provision would amount to statutory confirmation of the Veterans' Administration rule,* with the addition of two more restrictive factors. Under the administrative standard, a reputation of marriage is necessary to warrant termination of benefits; and the standard does not apply where it is established that there is a legal impediment to a valid marriage between the widow and her male cohabitant. The matters of reputation and impediment are not material under the bill's provision.

"The committee does not believe that the U. S. Government should continue payment of gratuities to a claimant who after her veteran husband's death lives with a man and holds herself out openly to the public as the wife of such man. Accordingly, the more restrictive statutory

provision appears proper. The Veterans' Administration has reported that this provision would also permit more simplified administrative procedures, with a consequent lessening of administrative expense.

"In order to avoid harsh results which might result from application of the new standard to relationships terminated prior to enactment, the committee has adopted the recommendation of the Veterans' Administration that the bill be amended so that the statutory provision will apply only to the actions of a veteran's widow after enactment. *It is understood that the Veterans' Administration will continue to apply the present administrative rule to prior relationships.*" [Emphasis supplied.]

However, notwithstanding this language, the United States District Court for the District of Columbia has applied a more liberal standard and has entered many decrees directing the Administrator to resume benefit payments that had been terminated by the Veterans Administration before September 19, 1962, on the basis of its presumption of remarriage rule.

There is a bill pending before your committee, H.R. 7624, 91st Congress, which would have the effect of expressly ratifying the application of the presumption of remarriage rule in all the pre-1962 cases. While this would not resolve the basic problem stemming from the *Wellman*, *Thompson*, and *Tracy* cases, the Veterans' Administration believes that its objective is entirely consistent with the 1962 enactment and with the approval expressed by the Congress at that time of the prior Veterans' Administration practice. Accordingly, we recommend that your committee favorably consider this bill—either as an independent enactment or as an amendment to H.R. 17564.

It must be conceded that in some few of the litigated cases the presumption of marriage rule has been misapplied under facts of those particular cases. We have attempted to correct such errors as they have been brought

to our attention from time to time. Although a general review of all past determinations is not feasible, it is contemplated that further corrective action to remedy any clear and unmistakable errors that may have occurred will be taken as soon as the cases are brought to our attention.

Returning now to our discussion of judicial review of the Veterans' Administration's benefit determinations and H.R. 17564, it seems obvious that suits similar to the several hundred already filed can—and undoubtedly will—subject nearly every aspect of our benefit determinations to judicial review, including rating decisions, related Veterans' Administration regulations, Administrator's decisions, and various adjudication procedures. Moreover, in the cases considered so far, the U.S. District Court has not been governed by the time limitations and conditions usually applicable under Federal statutes and rules governing suits against the United States or its officials when specific statutory authority has been granted for judicial review. One consequence of this is that judgments for retroactive benefits of over $18,000 for installments accruing from a period commencing as early as the 1940's have been rendered, and these judgments have also ordered the Administrator to deduct as much as 25 percent attorneys' fees from the benefits due and to become due. The scope of the *Tracy* decision and the decisions upon which it is based is so broad that it could well afford a basis for judicial review of millions of decisions terminating or reducing many types of benefits provided under laws administered by the Veterans' Administration. Such review might even extend to the decisions of predecessor agencies made many years ago. On the other hand, this judicially authorized form of review is inherently unfair since it does not permit review of any decisions denying an original claim for benefits.

Officials of the Department of Justice have expressed grave concern regarding the scope and volume of litigation

stemming from the *Tracy* decision. This, of course, is also a matter of great concern to the Veterans' Administration.

H.R. 17564, if enacted, would define the term "claim" to include an application for benefits or payments under any law administered by the Veterans' Administration; the assertion of rights to continuance, nonreduction, or restoration of such benefits or payments; and the assertion of right to such benefits or payments which have been found to be forfeited under 38 U.S.C. 3503 or 3504 or prior corresponding provisions of law. It proposes to make this definition effective as of October 17, 1940, the date of enactment of Public Law 866, 76th Congress. This amendatory law, establishing a uniform finality provision, for the first time used the word "claim." From an examination of the legislative history of Public Law 866, 76th Congress, it seems quite clear that the Congress intended the exemption from judicial review therein enacted to be all-inclusive and did not contemplate the construction adopted in the *Wellman, Thompson,* and *Tracy* decisions. Since the pending bill would, if enacted, remove all doubt as to the intended scope of the existing finality provisions, the Veterans' Administration strongly endorses the bill's enactment.

While we cannot furnish any precise estimate of the savings to be effected through the enactment of H.R. 17564, a study by the Veterans' Administration of the first 32 judgments adverse to the Administrator, has shown that accrued and estimated future payments in those cases alone will total in excess of $1.4 million. As heretofore noted, nearly all of these judgments involved application of the presumption of the remarriage rule.

The Veterans' Administration urges the favorable consideration of H.R. 17564 by your committee.

DONALD E. JOHNSON,
Administrator.

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT
Washington, D. C. 20001

May 12, 1972

Nathan J. Paulson
Clerk

No. 22,947—*Mrs. Patrocinia L. Vda De Rodulfa* v. *U.S. and Administrator of Veterans Affairs*

23,000—*Juliana Caparas Vda Del Rosario* v. *U.S. and Administrator of Veteran Affairs*

Henry F. Lerch, Esq.
815 - 15th Street, N.W.
Washington, D.C. 20005

Harold J. Nussbaum, Esq.
1420 K Street, N.W.
Washington, D.C. 20005

Gentlemen:

Enclosed is a copy of the Court's order denying your suggestion for rehearing.

You are further informed that your suggestion for hearing *en banc* was transmitted to the full Court, and no Judge has requested a vote thereon.

In view of the foregoing, it is not anticipated that any further action will be taken with respect to the suggestion for hearing *en banc*.

Yours very truly,

NATHAN J. PAULSON
Nathan J. Paulson
Clerk

NJP/bjg
Enc.
cc: David V. Seaman, Esq.

Filed May 12, 1972

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

September Term, 1971

Civil Action 635-65

No. 22,947

MRS. PATROCINIA L. VDA DE RODULFA

v.

UNITED STATES OF AMERICA
ADMINISTRATOR OF VETERANS AFFAIRS, *Appellant*

No. 23,000

JULIANA CAPARAS VDA DEL ROSARIO

v.

UNITED STATES OF AMERICA AND DONALD E. JOHNSON
ADMINISTRATOR OF VETERAN AFFAIRS, *Appellants*

Before: WRIGHT, MCGOWAN AND ROBINSON, *Circuit Judges.*

Order

On consideration of appellees' petition for rehearing it is

ORDERED by the Court that appellees' aforesaid petition for rehearing is denied.

Per Curiam

For the Court:

NATHAN J. PAULSON
Nathan J. Paulson
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-225

PATROCINIA L. VDA DE RODULFA AND JULIANA CAPARAS VDA DEL ROSARIO, PETITIONERS

v.

UNITED STATES OF AMERICA AND DONALD E. JOHNSON, ADMINISTRATOR OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioners are the widows of Philippine Scouts who died while in military service in World War II. Each was initially awarded monthly death compensation benefits pursuant to 38 U.S.C. 321. The Veterans Administrator subsequently terminated the awards on the basis of his determination that petitioners were no longer eligible to receive benefits (Pet. App. 4a-6a).

At the time of the Veterans Administrator's determination, 38 U.S.C. (1964 ed.) 211(a) provided that:

> Except as provided in Sections 784, 1661, 1761, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision.[1]

On the basis of the holding in *Tracy* v. *Gleason*, 379 F.2d 469 (C.A.D.C.), that Section 211(a) did not preclude judicial review of *terminations* of previous awards of non-contractual veterans' benefits, petitioners instituted these suits. The district court ruled that the termination of petitioners' benefits had been improper and entered judgments for petitioners. At the same time, the court also directed the payment of attorneys' fees to petitioners' counsel out of the monies to which petitioners became entitled as a result of the judgments.

The Administrator appealed the award of counsel fees, citing the express provision in 38 U.S.C. 3405, which prohibits the receipt, "directly or indirectly," of "any fee or compensation except as provided in Sections 3404 or 784 of" Title 38, United States Code.[2]

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[1] The statutory exceptions to the finality rule of Section 211(a) relate to contractual veterans' benefits (National Life Insurance, Section 784) and loan guaranties (Ch. 37 of Title 38).

[2] Section 3404 authorizes fees in proceedings before the Administrator. Section 784 governs suits based upon National

The Administrator pointed to the fact that there was no provision authorizing counsel fees in suits to obtain compensation benefits, and accordingly contended that the award of such fees by the district court was improper.

During the pendency of the appeal, Congress amended Section 211(a) to provide:

> On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veteran's Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise. [Pub. L. 91-376, Section 8(a), August 12, 1970, 84 Stat. 790.]

As set forth in detail in the opinion of the court of appeals, the legislative history of this amendment indicates that its purpose was to overrule *Tracy* v. *Gleason*, *supra*, thus precluding judicial review of all determinations of the Administrator pertaining to non-contractual benefits (Pet. App. 13a-18a). The provision in the amendment retroactively according finality to decisions of the Administrator made on or before October 17, 1940, divested the federal courts of jurisdiction in all pending cases, as well as those

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Service Life Insurance contracts, and expressly provides a percentage fee for successful counsel.

arising subsequent to the date of enactment (Pet. App. 17a-18a).

Without reaching the Administrator's alternative contention that the fee awards were barred under 38 U.S.C. 3405, the court of appeals held that the amended Section 211(a) withdrew the district court's jurisdiction to grant death compensation benefits, and, *a fortiori*, also deprived the court of power to award counsel fees based upon those benefits (Pet. App. 34a). The court accordingly vacated the district court's award of counsel fees.

2. Since the decision of the court of appeals is correct, and the issues raised by petitioners with respect to Section 211(a) will not recur, further review by this Court is not warranted.

The opinion of the court of appeals, on which we rely, thoroughly considers the language and legislative history of the amendment to Section 211(a) and correctly concludes that Congress intended to reach pending cases as well as suits brought in the future (Pet. App. 12a-18a).[3] And in holding that Section 211(a), as amended, deprived it of jurisdiction in this appeal, the court below properly applied the

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[3] Petitioners argue that Section 211(a), as amended, is inapplicable here because this case involves decisions of the district court (restoring forfeited benefits) rather than "decisions of the Administrator," as the statute provides (Pet. 8-11). But as the court of appeals recognized, with respect to this case the decisions referred to in the statute are the Administrator's original decisions in 1954 and 1955 terminating benefits—decisions petitioners sought to have set aside when they filed these actions.

principle that a supervening statutory amendment divesting the court of jurisdiction of the underlying claim necessarily also deprives the court of power to render a judgment—such as a fee award—predicated upon that claim. *Smallwood* v. *Gallardo*, 275 U.S. 56.[4]

Petitioners argue that if this interpretation of the amendment to Section 211(a) is correct their counsel have been deprived of vested interests in their fee judgments in violation of the Fifth Amendment (Pet. 11-17). But as the court of appeals correctly held, "Section 211(a) left unimpaired any litigable claim of counsel against their clients" (Pet. App. 32a) and, with respect to the government, there can be no contention that obligations under a preexisting contract have been impaired since counsel had no such contract with the government (Pet. App. 31a).[5]

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[4] This principle applies not only to cases pending in the trial court but also to cases, such as this, pending on appeal. *Smallwood* v. *Gallardo, supra*, 275 U.S. at 62; *United States* v. *Schooner Peggy*, 1 Cranch 103; and cases cited in the opinion below, Pet. App. 19a, n. 50.

[5] Quite apart from the effect of the 1970 amendment on Section 211(a), we believe that under the legislative scheme applicable to veterans' benefits, counsel fees may not be awarded in connection with suits to review claims for compensation benefits. See 38 U.S.C. 784(g), 3404(c) and 3405.

In any event, since it is undisputed that the amendment to Section 211(a) precludes judicial review of claims for non-contractual benefits, the propriety of counsel fees awarded—as here—in suits to review such claims cannot arise again.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-225

PATROCINIA L. VDA DE RODULFA AND JULIANA CAPARAS VDA DEL ROSARIO, *Petitioners,*

v.

UNITED STATES OF AMERICA AND DONALD E. JOHNSON, ADMINISTRATOR OF VETERANS AFFAIRS, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS TO MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

INTRODUCTORY STATEMENT

Insofar as the petition for certiorari deals with amended 211(a), it rests on two basic contentions. First, that on its face, the plain language of the section

did not deprive the lower court of jurisdiction and that court's holding to the contrary resulted in petitioners being deprived of their day in court and, *a fortiorari,* of due process of law. Second, that if Section 211(a) is deemed to apply to the facts of this case, then the rule of *McCullough* v. *Virginia,* 172 U.S. 102, requires the finding that Section 211(a), as applied below, is unconstitutional in that it divests petitioners' court-appointed attorneys of their court-awarded fees without due process of law.

The respondents have made the attorneys the real parties in interest since only the awards for attorneys' fee—not the primary judgments—were appealed. Their attempt to deal with petitioners' first contention is contained in footnote 3 on page 4 of the memorandum in opposition. That footnote misstates petitioners' position because petitioners do not rely on a distinction between "restoring forfeited benefits" and "decisions of the Administrator". Respondents' contentions with respect to petitioners' second basic argument are based on two cases which are inapposite and respondents made no reply whatsoever to petitioners' points IV and V.

Instead of meeting the constitutional issues head on, respondents have attempted to create the illusion that this case only involves fees for two attorneys; that federal law prohibits payments of such fees in any event;[1] that there are no constitutional infirmities in the decision below and that the issues raised will not recur. These contentions are discussed below.

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[1] The Court of Appeals did not reach this issue nor the subsidiary question of the reasonableness of the awards. However, at least 10 district court judges, after full briefing and argument, have decided these points against the respondents.

I

PETITIONERS HAVE BEEN DENIED DUE PROCESS OF LAW

Nothing in the express language of amended Section 211(a) will support a finding that the district judges' discretionary authority to award attorneys' fees[2] to the successful petitioners' attorneys is encompassed by the statutory language "decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration . . .". By its holding that this language applied, the lower court erroneously held that the district judges' award of fees were decisions of the Administrator. They were not. The decisions were purely judicial acts. Thus, petitioners were denied their day in court and thereby denied their rights to due process of law.

II

McCULLOUGH v. VIRGINIA, 172 U.S. 102

Respondents did not challenge petitioners' assertion that the decision below is in *direct conflict* with *McCullough* v. *Virginia*.[3] Instead, respondents cited *Smallwood* v. *Gallardo,* 275 U.S. 56, 62 and *United States* v. *Schooner Peggy,* 1 Cranch 103, for the proposition that amended Section 211(a) could constitutionally divest petitioners of their attorneys' fees which had been vested by a judgment. Neither case stands as authority for that proposition.

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[2] The inherent authority of district judges to award attorneys' fees as well as the nature of attorneys' charging liens is discussed in *Hanna Paint Manufacturing Co.* v. *Rodey, Dickason, Sloan, Akin & Robb,* 298 F.2d 371 (10th Cir. 1962), where one-third of net recovery was allowed as attorneys' fees in a Miller Act case.

[3] See also: *Pacific M.S.S. Co.* v. *Joliffe,* 2 Wall. 450 (1865); *Coombes* v. *Getz,* 285 U.S. 434 (1932); and *City of Memphis* v. *Brown,* 97 U.S. 294 (1878).

The *Gallardo* cases were a series of suits brought against *Gallardo,* treasurer of Puerto Rico, to restrain him from collecting certain taxes imposed by the laws of Puerto Rico. In one of the cases, *Gallardo* v. *Santini Fertilizer Co.,* 16 F.2d 368 (1st Cir. 1926), reversed, 275 U.S. 62 (1927), the district court granted a permanent injunction on March 31, 1925. On appeal the First Circuit reversed but several months later, on December 18, 1926, the court set aside its order and transferred the case to the Supreme Court, the only Court then having appellate jurisdiction of controversies involving the application or construction of the federal constitution. On March 4, 1927, Congress passed an act which provided that no suit to restrain the assessment or collection of taxes "shall be maintained in the district court of the United States for Porto Rico." On these facts, this Court, after argument on the merits, decided that the Act of March 4, 1927 deprived all courts of jurisdiction and it ordered the suit dismissed for want of jurisdiction. This ruling was explained in another of the series, *Smallwood* v. *Gallardo,* 275 U.S. 56, at 61-2, where this Court held that there is no vested right to an *injunction* against collecting illegal taxes, that the Act of March 4, 1927 did not affect previously valid contract rights; and that the taxpayer, under the Act, was not "left without power to resist an unlawful tax", i.e., he could pay under protest and sue for return (See: 16 F.2d at p. 546-7). Here, if petitioners cannot enforce their equitable charging liens against the fund being withheld from the widows' awards by respondents, then they have been left without recourse. If this remedy is destroyed so is the right.

United States v. *Schooner Peggy,* 1 Cranch 103 (1801), does not help respondents. It held that a ves-

sel could not be condemned where specifically prohibited by a treaty which became effective before the vessel had been definitely condemned. In addition, there was no vested interest because there was a direct appeal from the judgment. Here, the primary judgments which formed the roots of petitioners' charging liens have become final. Moreover, the *Schooner Peggy* case states "If the law be constitutional . . . I know of no court which can contest its obligation." In the instant case the constitutionality of Section 211(a) is seriously questioned.

III

MUCH MORE THAN ATTORNEYS' FEES ARE INVOLVED

Petitioners understand that respondents—if they win this case—do not propose to pay the sums withheld as attorneys' fees to the widows who obtained the final judgments. Respondents have indicated they will shield themselves from having to make such payments by saying they have obtained an act of Congress to avoid paying anyone, either the attorneys or the plaintiffs.[4] Surely, if respondents prevail, their position will require litigation of the identical issues presented here by the widows in every one of the nearly two hundred cases[5] which have been abated pending final decision of this case.

The Court below stated "counsel have not undertaken to identify any constitutional impediment" to application of Section 211(a) as construed by the Court of Appeals. The record shows that a serious constitutional issue was raised and rejected by the Court (App. 30a-31a). Thus, petitioners do not—as respondents

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[4] This statement of respondents' position was set forth at page 7 of the petition for certiorari and not denied by respondents.

[5] See appendix to petition, pages 46a-59a.

contend at page 6 of their memorandum, agree that there is no constitutional infirmity in amended Section 211(a) and petitioners rely on *Goldberg* v. *Kelly,* 397 U.S. 254 (1970); *Wheeler* v. *Montgomery,* 397 U.S. 280 (1970); *Richardson* v. *Perales,* 402 U.S. 389 (1971); *Richardson* v. *Belcher,* U.S. , 30 L.Ed. 2d 23, 92 S.Ct. (1971); *Bell* v. *Burson,* 402 U.S. 535 (1971) and *Wisconsin* v. *Constantino,* 400 U.S. 433 (1971). In substance, the rule of these cases is that procedural due process must be accorded persons receiving statutory benefits before such benefits can be cut off. This issue is ripe in each of the nearly two hundred pending cases as well as in thousands of other cases where widows' and dependents' benefits have been forfeited without the elementary rudiments of due process. Therefore, it is certain that respondents erroneously concluded that the issues raised here will never recur.

CONCLUSION

In *Goldberg* v. *Kelly,* this Court held that relief payments to the poor may not be terminated without a hearing and in *Wisconsin* v. *Constantino,* this Court held that one may not by state action label one an alcoholic without a due process hearing.

Now, the Court is asked to protect the right to counsel in civil cases involving federal rights and privileges. The district judges saw fit to appoint counsel and when they succeeded, the judges rewarded them with fees from the funds they created. The issue is not really judicial review of acts of the Veterans' Administration but the right of attorneys to survive economically and to function successfully at the command of the bench. The respondents seek to deny that right by obtaining and citing a new statute which

nowhere asserts a denial of the right of the courts to command and compensate the members of the bar. The petition for certiorari should be granted for the reasons above stated and to assure the effective rights to counsel and the protection of the legal profession.

Respectfully submitted,

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October 10, 1972